SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1276

EDD PRUITT and MARJORIE ANN PRUITT,
Petitioners,

v.

HELENE CURTIS INDUSTRIES, INC.,
and COSMAIR, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioners, Edd Pruitt and Marjorie Ann Pruitt, pray that a writ of certiorari issue to review the judgment and opinion entered by the United States Court of Appeals for the Fifth Circuit on October 27, 1967, in this proceeding.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, dated October 27, 1967, is reported at 385 F.2d 841. It appears in the Appendix hereto.

No opinion was rendered by the United States District Court for the Northern District of Texas.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 27, 1967, and a timely petition for rehearing was denied on January 2, 1968. This petition for certiorari was filed within 90 days of that denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in formulating and applying a federal test of the sufficiency of the evidence to support a jury's verdict in a diversity case, a federal appellate court can test that sufficiency in terms of whether that court believes there is a "rational" basis in the record for the jury's verdict.

2. Whether a diversity litigant's right to the benefits of a jury trial under the Seventh Amendment is violated by the action of a federal appellate court reversing a jury verdict where the court substitutes its views for those of the jury as to what evidence, what inferences and what results are "rational."

3. Whether a federal appellate court is free, under the *Erie* doctrine, to ignore relevant state substantive law as to the standards for imposing strict liability on product manufacturers and to create and apply those principles of strict liability that accord with that court's own policies and beliefs.

4. Whether a violation of § 361 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 361, is demonstrated by a jury finding that the conditions of use of an adulterated cosmetic, as prescribed in the labeling thereof, were followed, and whether such a violation constitutes negligence per se under applicable law without proof as to due care or foreseeability of harm.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Code, Title 28, § 1652:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions, in the courts of the United States, in cases where they apply.

United States Code, Title 21, § 361:

> A cosmetic shall be deemed to be adulterated—
>
> (a) If it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary or usual . . .

STATEMENT OF THE CASE

The petitioners, man and wife, brought this action in the United States District Court for the Northern District of Texas, premising jurisdiction on the diversity of the parties' citizenship. As amended, the petitioners' complaint sought the recovery of damages in the amount of $125,000, allegedly resulting from the purchase, mixture and application to the wife's hair of two products manufactured by the respondents herein: (1) "Helene Curtis New Blue Bleach," manufactured by the respondent Helene Curtis Industries, Inc.; and (2) "L' Oreal Creme Developer," manufactured by the respondent Cosmair, Inc.[1]

[1] Two other corporations, Nestle-Lemur Company and Clairol, Inc., were also named as defendants. But summary judgments were later entered in their favor, absolving them of any liability. R. 489.

The amended complaint asserted that the respondents had warranted that these two products were merchantable and reasonably suited for their intended use of dyeing and bleaching hair and that the petitioner wife had relied upon that warranty. But in fact, it was alleged, the products were "dangerous and poisonous and had ingredients in them that caused Plaintiff's injuries and damages." R. 493. And it was also claimed that the respondents had given "an inadequate warning concerning the test to be used before said products were applied to Plaintiff's head." R. 493. Violations of the Federal Food, Drug, and Cosmetic Act were alleged, it being claimed that the products were adulterated within the meaning of that Act and that the proper cautions were not given in the instructions as required by the Act. R. 494-495.

The petitioners' amended complaint further asserted that the use of these two products was the direct proximate cause of "a severe burn to her head, scalp, neck, ear, and the resulting loss of Plaintiff's hair in one portion of her scalp." R. 491. The fact that she suffered such injuries was never denied or disputed. The severe third-degree burns were permanent in nature, necessitating numerous skin grafts and total loss of her hair in the affected area. The top portion of her right ear was permanently deadened and withered. As a result, at the age of 22, the petitioner wife must wear a wig to cover her cosmetic damage, must suffer some permanent pain and suffering and has undergone a change in her personality and emotional make-up.

Trial was had before a jury, Judge Sarah T. Hughes presiding. The evidence at the trial concerning the circumstances of this tragic incident was undisputed and may be briefly summarized as follows:

The petitioner wife, a life-long resident of Ringgold, Texas, was a brunette who desired to be a blond. The first step in effectuating such a desire is to bleach one's hair. A friend, Mrs. Billie Hendren, volunteered to bleach the wife's hair. Mrs. Hendren had had experience in bleaching her own hair

and had used the products in question on her own hair on two occasions; while she had had no professional training as a beautician, she at one time had "lived across the hall . . . .from a girl that was going to beauty school. . .and I studied her books as much as she did and we studied together." R. 185.

In preparation for the bleaching operation, Mrs. Hendren went to a beauty shop in Terrell, Oklahoma, and purchased from a friendly beauty operator fresh supplies of the two products in question. She stated that "they were cheaper by getting them through the beauty shop than I could get them at a drugstore or any place else," R. 160, and that she was charged only the cost of the products to the beauty shop, R. 194. On the following day, Oct. 18, 1963, Mrs. Hendren mixed and applied the two products to the wife's hair in the kitchen of Mrs. Hendren's home in Terrell.

Both the wife and Mrs. Hendren testified that they had read and carefully followed the instructions accompanying the products. R. 29, 162-163. They noted on the box containing Helene Curtis New Blue Bleach the words "For Professional Use Only—Not for Public Sale," and on the bottle of L'Oreal Cream Developer the phrase "For Professional Use Only." They also noted the Helene Curtis instruction: "Do not mix Helene Curtis New Blue Bleach with anything except Helene Curtis Creme Developer (or a good grade of fresh 20 volume hydrogen peroxide.)" And on the L'Oreal Cream Developer bottle was seen the statement: "For tinting or bleaching use L'Oreal exactly as you would use twenty-volume peroxide with Imedia Petit, Imedia Petit Excellence, Imedia Creme, Super Blue Cream, or L'Oreal Lightener."

Acting pursuant to the instructions, Mrs. Hendren put on rubber gloves and performed the various bleaching processes. This was done after it was ascertained that the wife had not brushed or pre-shampooed or massaged her hair or scalp during the preceding 24 hours and after it was evident that her scalp had no cuts, eruptions or abrasions; the presence of any of these factors, according to the Helene Curtis

instructions, would have made it dangerous to proceed with the bleaching.[2]

Mrs. Hendren first mixed the proper amounts of the two products, it being the belief of both the wife and Mrs. Hendren that the L'Oreal Creme Developer fitted the Helene Curtis description of "a good grade of fresh 20 volume hydrogen peroxide" that could be mixed with Helene Curtis New Blue Bleach. R. 76, 163. The L'Oreal Creme Developer described itself as usable for bleaching purposes, "exactly as you would use 20-volume peroxide." R. 73.

The next step in the bleaching process, as performed by Mrs. Hendren pursuant to the instructions, was to make a so-called preliminary strand test of the wife's hair. This was done by taking a small strand of hair and applying the mixture "generously" to the entire length of the strand from scalp to outer tip. No ill effects were apparent from this test. And the test further determined the proper length of time to leave the mixture on the wife's hair in order to achieve the desired bleached color. R. 166.

After rinsing off the strand of hair used in the test, Mrs. Hendren proceeded to mix the remainder of the batch and to apply the mixture to all the hair from "about an inch out from the scalp to the end of the hair," starting on the back section of the right side of the head. R. 166. She then repeated the process by covering the inch out from the scalp. According to the instructions, the mixture was to be left on the hair "usually" for "about one and one-half hours of bleaching." Pls. Ex. 2. Mrs. Hendren, however, had

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[2]The Helene Curtis instructions also noted that "New Blue Bleach may nevertheless cause an allergic response in a susceptible person" and that "If scalp irritation is noted, stop using the product until it has been determined by proper patch test that the reaction is not due to an allergy." No such allergic response or scalp irritation occurred on the wife's head and hence no patch test was indicated or in fact given.

determined from the test that the wife's hair would bleach faster than thus indicated.[3]

At one point during the application of the mixture, Mrs. Hendren stopped to give herself and the wife glasses of previously prepared iced tea. R. 168. She then proceeded with the application on the last inch out from the scalp. But before the last section of the hair had been covered in this fashion, the wife complained that the right rear portion of her scalp was burning and stinging. Mrs. Hendren immediately took the wife to the sink, turned on the warm water faucet and washed out all the mixture from the entire head. R. 169. At that point she noticed a portion or spot in the right rear of the head "that was swollen out and her ear looked real puffed, the top of her ear, right here, and there was a portion of that hair that hadn't bleached." R. 169. The family doctor was called and appropriate medical attention thereafter ensued. The injury was diagnosed as a severe or third-degree chemical burn to the top of the right ear and to the head above and behind the right ear.

In the confusion surrounding the accident, Mrs. Hendren threw out the unused mixture and the other remnants of the two products. The ingredients of the mixture actually used were thus never available for testing or analysis.

The testimony of respondents' witnesses concerning the care taken in the manufacture and composition of the two products tended to show that, when each was used individually according to instructions, no harm would ensue to the user. But the precise composition of each product was labelled a trade secret and the chemical contents thereof were not made available during the trial. R. 265, 317, 321.

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[3]It was inevitable, of course, that portions of the mixture would occasionally touch the ears, neck or face. As this occurred, Mrs. Hendren followed the instructions by removing the mixture immediately from the touched area by using absorbent cotton soaked in water. R. 164.

At the conclusion of the testimony, special issues were submitted to the jury. These questions were preceded by several definitions of terms used in the issues, including (1) "preponderance of the evidence," defined to mean "the greater weight and degree of credible testimony before you," (2) "ordinary care," defined to mean "that degree of care that would be exercised by a person of ordinary prudence under the same or similar circumstances," (3) "negligence," defined to mean "a failure to exercise ordinary care," and (4) "proximate cause," defined to mean "that cause which in its natural and continuous sequence, unbroken by any new and independent cause, produces a result that would not have occurred but for such cause, and which said result or some like result ought reasonably to have been foreseen or anticipated by a person of ordinary prudence in the exercise of ordinary care in the light of attending circumstances." R. 573-574.

Twenty-five special issues were framed by Judge Hughes, but some of them required no resolution in light of the jury's answers to certain other issues. The determinations that were thus made by the jury, together with the evidence supporting such determinations, may be summarized as follows, bearing in mind that much of such evidence was disputed:

(1) *The jury found, from a preponderance of the evidence, "that Helene Curtis New Blue Bleach or L'Oreal Cream Developer contained ingredients that were not suitable and reasonably fit to be used for the purpose for which said products were used when used in combination with each other."* R. 575.

The petitioners did produce competent testimony to justify that jury finding. Dr. Majors, the family physician, testified that his examination of the injury led him to believe "that this chemical burn was produced by the application of the bleaching substance she told me she used on her scalp." R. 100. He further stated that "possibly one of two things happened. One—is that there was some mislabeling of one

of the two bottles so that the solution or the powder was not what was usually in these powders or solutions or that the directions were not followed properly." R. 119.

Moreover, Mr. Emil Dieter, a chemist for Helene Curtis, agreed that "to produce a burn such as this would mean that this product was either improperly manufactured or improperly mixed." R. 280, 295. And Mr. B. B. Anderson, an analytical and consulting chemist who tested both products in question, testified that the primary reaction from the mixture of the products was "the liberation of the oxygen from the hydrogen peroxide, which is your bleaching ingredient or your main active ingredient." R. 415. He further testified, in answer to a question as to whether the chemical applied to the wife's hair would have had to be of a different strength than present in the test samples to produce a burn of the size and magnitude here involved, that the chemical would have "had to be much stronger than what we analyzed." R. 426. Or, as he later stated, the cause of the burn had to be "an increase in the strength [of the peroxides] of one we found [in the test samples]." R. 437.

(2) *The jury found, from a preponderance of the evidence, that the aforementioned ingredients "were a proximate cause of the injury" to the petitioner wife.* R. 575.

The preceding testimony that the wife's chemical burn could have been caused by the application of the products in question and that such a burn would have had to be due to an increase in the strength of hydrogen peroxide over what is normally present in the products justified the finding that the ingredients of the mixture were a proximate cause of the injury.

Moreover, by finding that these ingredients were a "proximate cause" of the injury, the jury was necessarily finding, as the instructions permitted, that such cause was one that produced a result that "ought reasonably to have been foreseen or anticipated by a person of ordinary prudence in the exercise of ordinary care in the light of attending circum-

stances". R. 574. Clearly it was rational to infer that injury to the user ought reasonably to have been foreseen in the exercise of ordinary care from an improper and excessive amount of hydrogen peroxide contained in one or both products.

(3) *The jury found, from a preponderance of the evidence, that both products "had such ingredients" as described in the preceding two special findings.* R. 576.

While the hydrogen perodixe was to be found only in the L'Oreal Creme Developer, both products were clothed in trade secrets and the precise composition of each was unknown to the jury. Nevertheless, there was evidence, heretofore detailed, that the combined products produced the burn and it was reasonable to conclude that the excessive amount of hydrogen peroxide in combination with the other known and unknown components of the products constituted unsuitable and unfit ingredients.

(4) *The jury found, from a preponderance of the evidence, that both Helene Curtis Industries and Cosmair, Inc. "failed to give proper warning of the use of said products to prospective users" but that such failure was not "a proximate cause of the injury of Marjorie Ann Pruitt."* R. 576-577.

This finding was favorable to the respondent corporations but does not detract from the decisive impact of the findings as to their liability on grounds other than the improper warnings.

(5) *The jury found, from a preponderance of the evidence, that both products "contained substances which were corrosive"—a term defined by the instructions to mean "any substance which in contact with living tissue will cause destruction of tissue by chemical action."* R. 577, 578.

Hydrogen peroxide, of course, is a well-known corrosive substance that can cause destruction of human tissue when present in excessive amounts. The L'Oreal product concededly contained hydrogen peroxide and the jury could rationally conclude that when both products were mixed together as directed they contained "corrosive" substances.

(6) *The jury found, from a preponderance of the evidence, that "such corrosive substance. . .was a proximate cause of the injury of Marjorie Ann Pruitt."* R. 578.

The evidence detailed in support of special findings (1) and (2) above equally supports this finding by the jury.

(7) *The jury found, from a preponderance of the evidence, that neither manufacturer "failed to properly inspect and test the manufacture" of the respective products.* R. 578, 579.

This finding, favorable to the respondents, related only to the periodic sample testings at the factories and does not preclude the possibility that one batch or one bottle of the products may have contained an undetected and improper amount of a corrosive or unfit substance.

(8) *The jury found, from a preponderance of the evidence, that the wife was not negligent in mixing the two products, that she did not fail to follow the instructions for use of the two products, and that Mrs. Hendren did not apply the products to the hair in a negligent manner.* R. 580-582.

The testimony of the wife and Mrs. Hendren was clear and uncontradicted to the effect that they both carefully read and followed the instructions for mixing and applying the products in question. R. 29, 162-163. While there was some evidence that the trade secrets made it impossible to ascertain the compatability of the two products and that the use together of these two products could not be recommended by the respondents' experts, the jury was entitled to believe the testimony that the L'Oreal product qualified as a 20-volume peroxide (R. 417-418) that could be used in conjunction with the Helene Curtis product, especially since the L'Oreal bottle described itself as usable "exactly as you would use twenty-volume peroxide."

This justified finding of the jury was critically significant in the ultimate finding of liability since it excluded the possible alternative causes of the injury. The expert testimony was clear that the severe chemical burn could have been

caused only by an improper mixture at the factory or by an improper combining of the products at the time of use, contrary to directions. R. 119, 280, 295. And there was further evidence that even a bobby pin or a cut on the head (neither of which was present here) could not have increased the activity of the products enough to cause this burn. R. 423, 427. Thus, by finding that the instructions were followed, and by excluding all other possibilities, the jury could properly find that the sole cause of the injury was a manufacturing fault by the respondents.

(9) *The jury found, from a preponderance of the evidence, that "the occurrence in question was not an unavoidable accident"—i.e., an accident that happened without negligence on some one's part.* R. 583.

From the specified evidence, the jury plainly could conclude that but for the respondents' negligence in preparing the products that were actually used the accident would not have happened. The evidence was clear that the products ordinarily do not cause burns when properly prepared at the factories and when used according to directions. The conclusion that negligence on some one's part caused the injury is thus inescapable. And, having determined that there was no negligence on the part of the wife or Mrs. Hendren, the jury was entitled to find that the negligence lay with the respondents.

(10) *The jury found, from a preponderance of the evidence, that the recoverable damages to the wife and her husband resulting from this injury amounted to $62,950, plus $1,600 in hospital and doctor bills.* R. 583-585.

Pursuant to this finding, judgment in the amount of $64,550 against the respondents Helene Curtis Industries, Inc., and Cosmair, Inc., "jointly and severally", was entered on November 27, 1964. Interest on that amount at the rate of 6% from the date of entry of judgment to the date of satisfaction of the judgment was also decreed. R. 605.

On appeal, the Court of Appeals for the Fifth Circuit reversed the judgment of the District Court and ordered that judgment be rendered in favor of the respondent corporations.

REASONS FOR GRANTING THE WRIT

The 41-page opinion of the Fifth Circuit seeks to recast the traditional relationship between appellate review power and the fact-finding and inference-making function of federal juries in diversity cases. And that opinion also attempts to extend the established boundaries of a federal court's duty under *Erie R. Co. v. Tompkins,* 304 U.S. 64, to expound and apply state substantive law in diversity situations.

Left unreviewed and uncorrected, the decision below will stand as precedent for the following three propositions: (1) a federal appellate court is free to substitute for the jury's supportable inferences those which the court itself feels to be more "rational", (2) a federal appellate court is free to create and apply as the controlling state law of strict product liability those principles of liability that the federal appellate court would like to adopt for itself, and (3) a violation of the Federal Food, Drug, and Cosmetic Act does not constitute negligence per se.

Such propositions are both dubious and ill-advised. They squarely conflict with the applicable principles established by other courts. And they have been combined by the court below so as to deprive the petitioners of their Seventh Amendment right to the benefits of a jury trial. In these circumstances, and for the reasons more fully developed below, the grant of certiorari to review the judgment below becomes most compelling.

1. The decision below is in conflict with the rulings of this Court as to the reviewability of the evidence supporting a jury verdict.

The Fifth Circuit, as a premise to its ruling, made it plain that it was adopting and applying a federal test as to the nature and quantum of proof necessary to establish strict liability under the applicable Oklahoma law.[4] As it had done in its earlier ruling in *Planters Mfg. Co. v. Protection Mutual Ins. Co.*, 380 F.2d 869,[5] the Fifth Circuit here announced, at pages 9-10 of its opinion, that "the sufficiency of the evidence is a matter of federal law" and that

> "The test employed by the Fifth Circuit is that a fact issue must be submitted to the jury if reasonable men could differ on the conclusions to be reached from the evidence presented. . . . We must view the evidence and all reasonable inferences most favorably to the party against whom the motion is

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[4] At page 4 of its opinion, the Fifth Circuit noted that a federal court sitting in Texas should apply the substantive law of the state in which it sits and that such substantive law includes the conflicts-of-law rules. Since Texas in conflicts situations applies the *lex loci delictus* rule and since the injury here occurred in Oklahoma, the Fifth Circuit ruled that Oklahoma substantive law is controlling. It was also noted that both Oklahoma and Texas have adopted the theory of strict liability in tort.

[5] This Court denied certiorari but a few months ago in the *Planters* case. 389 U.S. 930; No. 529, Oct. Term 1967. The Fifth Circuit in *Planters* had noted that this Court "has yet to settle the conflict which exists among the courts of appeals" as to whether federal or state law governs the determination of the sufficiency of the evidence to raise a question of fact for the jury in diversity cases. 380 F.2d at 870. In formulating a federal rule, the Fifth Circuit in *Planters* adopted the concepts of sufficiency of evidence to support a jury verdict developed by this Court in Federal Employer Liability Act cases, especially *Lavender v. Kurn*, 327 U.S. 645.

> made. Moreover, only the evidence and the reasonable inferences which support. . .[petitioners'] theory may be considered. . . . Indeed, after *Planters* our sole function is to ascertain if there is a *rational basis in the record* for the jury's verdict." [Emphasis in opinion.]

Petitioners have no quarrel with the Fifth Circuit's adoption of a liberal federal rule as to the sufficiency of the evidence, a rule that the Fifth Circuit has made plain is taken *in toto* from the rule employed in *Lavender v. Kurn*, 327 U.S. 645, and in other F.E.L.A. decisions of this Court. But they do quarrel with any formulation of a rule that in terms or in practice permits an appellate court, in determining whether there is a "rational basis in the record for the jury's verdict," to substitute its view for that of the jury's as to what evidence, what inferences and what result is rational. Significantly, the F.E.L.A. rule developed by this Court and purportedly adopted here by the Fifth Circuit speaks not in terms of searching for a "rational" basis in the record but for an "evidentiary" basis to sustain the jury's verdict. *Lavender v. Kurn, supra*, 653; *Basham v. Pennsylvania R. Co.*, 372 U.S. 699, 700. And the prime purpose behind this Court's emphasis on what is "evidentiary" is to preclude judicial speculation as to what is more rational or reasonable than what the jury found.

Yet this proscribed post-trial speculation about what is more rational appears to be the hallmark of the Fifth Circuit's so-called federal rule, first announced innocently enough in *Planters* to sustain a jury verdict and now put to the real purpose of upsetting what the court deems to be an irrational jury verdict. The opinion below summarizes at some length (Opinion, App. pp. 12-15, *infra*) the petitioners' evidence that (1) the chemical burn had to be due either to a defect in the manufacture of the ingredients or to a failure to mix the products in accordance with directions, (2) the products were in this instance properly mixed by the two women in strict accord with the directions, and (3) there were no abnormal conditions or foreign particles in the wife's hair.

But instead of directing its attention to whether such testimony constituted "an evidentiary basis for the jury's verdict," *Lavender v. Kurn, supra,* 653, the Fifth Circuit in execution of its new federal rule engaged in the following speculations about what the court—not the jury—deemed to be rational or irrational:

(a) The Fifth Circuit disposed of the foregoing evidence with the remark that "we believe that in this instance a finding of a defect was unwarranted," particularly since it is "a matter of common knowledge that cosmetics can never be made completely safe for all users and can cause injuries for many reasons other than a defect in the product." Opinion, App. pp. 15, 17-18, *infra.*

(b) The Fifth Circuit stated its view, despite the evidence that no possible factors other than improper manufacture could have caused the burn, that the petitioners "failed to prove that it was the toxicity of the products which caused the injury rather than the other factors just enumerated [contact with other products, the method of application, or an allergic condition]." Opinion, App. p. 2, *infra.*

(c) The Fifth Circuit termed the evidence that the products were either defective or misapplied as "equivocal" and doing "nothing to exclude each other," without bothering to determine if the jury could legitimately conclude from the evidence of proper application and the exclusion of other possible causes of the burn that the products must have been defective. Opinion, App. p. 19, *infra.*

(d) The Fifth Circuit, in disregard of what the jury could legitimately conclude from the conflicting testimony, stated its own view that the petitioners did not show "that the mixture of these products was intended," particularly since the directions on each package "suggest that the mixture was not intended." Opinion, App. p. 20, *infra.* Thereby ignored was the evidence before the jury that the L'Oreal product was a 20-volume hydrogen peroxide mixture that could be joined and was in fact properly joined with the Helene Curtis product as directed. And by ignoring that

evidence, the court was able to say that there was no "rational basis in the record from which the jury can make a selective choice" as between a defective product and a mixture contrary to directions. Opinion, App. p. 22, *infra*.

(e) Again without making any inquiry into the permissibility of the jury's conclusion on the subject, the Fifth Circuit announced flatly that the respondent manufacturers cannot "be said" to have foreseen this mixture "since the trade secrets of one maker prevented any safety tests on the product of the other." And in disregard of the jury instructions and consequent findings of foreseeability of harm from from improperly made products, the Fifth Circuit proclaimed as *ispe dixit* that the mixing of these products "amounted to an abnormal handling or substantial alteration which, because it was unintended and unforeseen, excuses the makers from responsibility for any harm." Opinion, App. p. 23, *infra*.

(f) The Fifth Circuit overtly searched the record for evidence which it felt made Mrs. Hendren's methods of application "the conduct of an atypical user and render the finding of a defect in the products irrational." Opinion, App. p. 27, *infra*. Thus the court, in rendering the jury verdict "irrational" in this respect, looked not to the evidence which might have supported that verdict but to other evidence of a contradictory nature from which an opposite verdict might have been drawn—i.e., evidence that the words "for professional use only" on the products could be interpreted to mean use by professional beauticians only and that a professional beautician would have taken even greater care than specified in the written directions or than taken by Mrs. Hendren to guard against leaving the solution on the hair too long. Such additional precautions, *in the court's view*, would have lessened the chances of injury and served to nullify the statements that the products were either defective or misapplied. Opinion, App. p. 26, *infra*.

In thus labelling as "irrational" the jury's contrary verdict, the court below made not the slightest effort to test

the evidentiary support in the form of testimony that, whatever the language on the products and whatever other steps were taken to insure sale to professional beauticians only, non-professionals like Mrs. Hendren obviously could and did purchase the products with ease. Did not that fact alone justify an inference by the jury that Mrs. Hendren and the petitioner wife were among the foreseeable and thus intended users and that whatever additional precautionary steps might be deemed necessary should have been spelled out in the instructions?[6]

(g) Finally, the Fifth Circuit made its own speculation that the injury may have been due to an allergic reaction to the particular mixture here involved, a possibility that should have been explored through a patch test (not mentioned or recommended in the directions) that a professional "would have performed." Opinion, App. p. 28, *infra.* The uncontradicted evidence before the jury that the wife's hair and skin were normal in all respects and that she had no known allergies was dismissed as meaningless since, in the court's view, "none of her evidence was connected to the prior use of these products." And any presumption that her skin was normal was said to be "contrary to common sense"—a judicial evaluation allegedly "reinforced" by the Fifth Circuit's own finding of fact "that the products were mixed contrary to directions and applied by a novice." *Ibid.*

A more complete reversion to a *de novo* and subjective review of a trial record by an appellate court would be difficult to imagine. Despite all its protestations to the con-

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[6] The Helene Curtis directions, set forth in the Opinion, App. p. 13, *infra,* are written in simple language more appropriate for public than professional consumption. The jury could appropriately find, as it did (R. 576), that these instructions, to the extent that they failed to warn of the need for a patch test, "failed to give proper warning of the use of said products to prospective users."

trary, the Fifth Circuit has gone far beyond the limits of searching for and testing the evidentiary basis in the record for the jury's verdict. It has made its own intensive quest for other evidence to support a completely contrary verdict; it has made its own subjective evaluations and inferences as to whether the directions were followed, whether the products were meant to be mixed and whether the wife was an "intended user"; it has taken unto itself the jury's task to determining causation and foreseeability of harm; and instead of testing the adequacy of the evidence that could support the jury's verdict, the Fifth Circuit merely applied the epithet "irrational" to such evidence.

Thus the Fifth Circuit's concept of the federal test for evaluating the propriety of a jury's verdict, particularly as applied in this instance, is a complete negation of all the principles heretofore established by this Court—principles which the Fifth Circuit purported to use in formulating its federal test. Time and again this Court has warned that "it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury." *Lavender v. Kurn*, 327 U.S. at 652-653. And where, from the record, "there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search [by an appellate court] for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364. Thus, having found no error in the instructions, the Fifth Circuit should have affirmed the jury's verdict. See *Parks v. Simpson Timber Co.*, 388 U.S. 459.

Because, in diversity cases like the instant one, it is the Seventh Amendment that fashions "the federal policy favoring jury decisions of disputed fact questions," *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525 at 538, the grant of cer-

tiorari becomes appropriate to consider the constitutional propriety of the Fifth Circuit's standard for review of jury verdicts, as applied in this case.

2. The decision below raises important problems as to a federal court's function in determining and applying state law in a diversity case.

The alternative basis of the judgment below is to be found in the last 13 pages of the opinion, containing a ruling that as a matter of law the doctrine of strict liability forecloses any recovery in this case. Opinion, App. pp. 29-41, *infra.* Presumably and necessarily, that ruling was meant to be reflective of the Oklahoma law of strict liability, the court having remarked some 24 pages earlier that "Hopefully, our '*Erie* prediction' will be indicative of what Oklahoma will do in the future and will not be easily erased." Opinion, App. p. 5, *infra.*

Preliminarily, it should be noted that since Oklahoma is in the Tenth Circuit the judges of the Fifth Circuit are not presumed to be "familiar with the intricacies and trends of local [Oklahoma] law and practice." *Huddleston v. Dwyer,* 322 U.S. 232, 237; *General Box Co. v. United States,* 351 U.S. 159, 165. Their evaluation and prediction as to the Oklahoma law of strict product liability are thus not entitled to the weight otherwise accorded by this Court to such pronouncements by federal judges as to the law of a state within their Circuit.

But, more importantly, the Fifth Circuit's decision raises several serious questions whether the *Erie* function of discovering and applying the applicable Oklahoma law was properly performed here:

(a) *Did the Fifth Circuit even attempt to discover or apply the Oklahoma law of strict liability?* Apart from a "cf." reference to the Oklahoma Supreme Court decision in *Marathon Battery Co. v. Kilpatrick,* 418 P.2d 900, the entire 13-page dissertation by the Fifth Circuit of the law of strict liability contains not one reference to or discussion of Okla-

homa law, or the techniques used by Oklahoma courts to fashion developments or extensions of that law. See Opinion, App. pp. 29-41, esp. p. 39, *infra*. At the same time, the Fifth Circuit acknowledged earlier in its opinion that the *Marathon* decision, while its basis was said not to be clear, justified "the conclusion that Oklahoma will also adopt the theory of strict liability in tort." Opinion, App. p. 4, *infra*.

Actually, had the Fifth Circuit given heed to the *Marathon* decision instead of concentrating on a wide assortment of law review articles and decisions from other state courts a highly relevant delineation of the Oklahoma law of strict liability would have become apparent. That decision, rendered in 1966, involved the liability of a manufacturer of a battery that had exploded while in the hands of a user-purchaser. The Oklahoma court there ruled, in language fully applicable to the instant case, that:

> "Neither are we required to consider defendants' argument that the evidence failed to show negligence in manufacture, defective conditions when sold, that harm could result when used as intended, or that such alleged negligence or defect was the proximate cause of the injury. It is an accepted rule that proof of negligence is unnecessary to establish liability for breach of warranty." 418 P.2d at 911.
>
> "The primary issue involved was whether the battery exploded, and the matter was explicitly submitted to and determined by the jury. We have held consistently that in civil cases the facts are provable by direct or circumstantial evidence, or by both. And it is not required that the proof rise to that degree of certainty which will support only one conclusion to the exclusion of others." 418 P.2d at 917.
>
> "The defense was that the battery could not explode, therefore the explosion which occurred resulted from outside agency or force. It is settled law that the weight to be given to expert testimony

is for the jury, who may follow their own experience, observations and common knowledge and reject the opinions of experts." 418 P.2d at 914.

"We . . . hold the manufacturer's liability was established when it was shown that plaintiff was injured while using the battery for the purpose intended by reason of a defect as to which he was not aware, and could not have ascertained by examination." 418 P.2d at 915.

It is thus apparent that the Oklahoma law of strict liability greatly reduces the degree of proof necessary to establish fault on the part of the manufacturer of a product and heavily relies upon the good sense of juries to make the necessary findings and inferences. Indeed, with respect to the proof necessary to establish strict liability, the Oklahoma rule appears to be no different than that followed by most other states. And as one authoritative commentator has recently observed,[7] "it seems quite apparent that there is nothing in any of the strict liability cases to indicate that the problems of proof will be dealt with in any different manner than in those involving only negligence." Even as to such concepts as that of "intended use," discussed at great length by the court below, it is generally recognized that this notion "is but a convenient adaptation of the basic test of 'reasonable foreseeability' framed to more specifically fit the factual situations out of which arise questions of a manufacturer's liability for negligence." *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 83 (C.A. 4). See also *Parks v. Simpson Timber Co.*, 388 U.S. 459; *Albanese v. N. V. Nederl. Amerik Stoomv. Maats.*, 382 U.S. 283. As to all such matters, the Oklahoma law is not unique in making the jury the prime arbiter of factual disputes and inferences.[8] Given

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[7]Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn.L.Rev. 791, 848 (1966).

[8]In *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 525-526, this Court stated: "The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that neg-

proper jury instructions and supportable findings on these issues, an appellate court is not free under either Oklahoma or federal law to disregard the jury verdict. See *Parks v. Simpson Timber Co., supra.*

The Fifth Circuit's complete failure to appreciate or apply the Oklahoma law of strict liability, as enunciated in the *Marathon* decision, suggests that it "has so far departed from the accepted and usual course of judicial proceedings" in this *Erie*-type situation "as to call for an exercise of this Court's power of supervision." Rule 19 of this Court's Rules.

(b) *Did the Fifth Circuit, instead of applying Oklahoma law, attempt to create a rule of strict liability in accord with its own views as to desirable policies and results?* In an *Erie* situation, a federal court must attempt to discover and apply state substantive law, even though it be difficult to ascertain precisely what the state law provides. See *Meredith v. City of Winter Haven,* 320 U.S. 228, 234-235. But the federal court "must keep in mind . . . that its function is not to choose the rule which it would adopt for itself, if free to do so, but to choose the rule which it believes the state court, from all that is known about its methods of reaching decisions, is likely in the future to adopt." Wright, *Federal Courts,* § 59, p. 206 (1963).

Yet the Fifth Circuit appears here to have enunciated at great length its own feelings and policies regarding strict liability without so much as a nod in the direction of Okla-

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ligence consists of doing that which a person of reasonable prudence would have done under the circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. '[W]e think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' "

homa's possible feelings and policies in this respect. Marshalling a host of court decisions from other states, law review articles and the Fifth Circuit's own views of the evidence in this case, the opinion below is replete with such broad policy statements as:

(1) The respondent corporations "were not required to give directions which would allow Mrs. Pruitt to use the products safely. Indeed, they could confine their products to beauty shops, and incur liability only if a consumer were injured when the solutions were applied there." Opinion, p. 33.

(2) "*Harper* [a New York decision] and *Kaspirowitz* [a New Jersey decision] suggest that a warning to the beauty shop terminated the makers' responsibility for the future sale of the product . . . . These words [on respondents' products] were sufficient, in light of the beautician's training and status as an expert, to apprise any beautician that the products were not for amateurs and thus not for resale. Therefore, the resale by the beauty shop amounted to an intervening cause which severed the causal chain and insulated Appellants from liability for any subsequent harm." Opinion, pp. 35-36.

(3) "That doctrine [of foreseeability of harm] is a judicial explanation of the social policies which limit liability. . . . Once fault is removed as a limitation on liability, these policy considerations should be candidly explained. Until Americans have a comprehensive scheme of social insurance, courts must resolve by a balancing process the head-on collision between the need for adequate recovery and viable enterprises." Opinion, p. 37.

(4) "In this type of market, it would be impossible to police the prohibited reselling by trade agreements. Nor can the single sale by a beauty shop in Terrell, Oklahoma be indicative of such widespread practice in the industry that we can hold that the makers knew or should have known of the practice and should have taken additional precautionary steps." Opinion, p. 38.

(5) "Therefore, although consumers' expectations are relevant, the expectations frustrated in this case are not the one which have been the impetus behind the imposition of strict liability. Alternative ways existed for Mrs. Pruitt to satisfy her desire to be a blonde. . . . She could have simply gone to a qualified beautician." Opinion, pp. 39-40.

(6) "The paramount reasons for denial of recovery in this case are the principles which have been traditionally employed to invoke the doctrine of strict liability. These policies compel our holding that the imposition of strict liability on these Appellants simply because they are the best-risk-bearers would be an undue impediment to business and an intolerable injustice. The policy that the maker has the greatest capacity to distribute the risks of loss is not such a blanket rule that it applies even though justice demands that another member of the marketing chain take the risk of loss for the injury." Opinion, p. 40.

Some of the foregoing remarks might be relevant in a petition to the Oklahoma legislature to limit the doctrine of strict liability by statute, or even perhaps in a brief filed in the Oklahoma Supreme Court. But it is impossible to say that such statements and assertions in any way reflect the present Oklahoma law respecting the policies or the limits of the doctrine of strict liability. They can only be classed as an expression of what the Fifth Circuit thinks the doctrine should be were that court free to enunciate a federal strict liability rule of its own. And even that expression is impregnated with the court's own subjective views as to what inferences might be drawn from the evidence, as distinguished from those legitimately drawn by the jury.

In thus exceeding its function under the *Erie* doctrine by formulating its own policies of substantive law, the Fifth Circuit has again "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 19 of this Court's Rules.

3. The decision below raises important problems under § 361 of the Federal Food, Drug, and Cosmetic Act.

The Fifth Circuit, in footnote 1 of its opinion (see App. p. 3, *infra*), has plainly misinterpreted the language of § 361. In holding that this section of the Act was not violated in this case, the court referred to § 361 as defining an "adulterated" cosmetic as one that causes harm "under conditions of use which are prescribed by the directions *and* must be used in the customary and usual fashion." [Emphasis added.]

Section 361 obviously reads in the alternative, not the conjunctive. A cosmetic is adulterated if it contains deleterious substances rendering it injurious to users "under the conditions of use prescribed in the labeling thereof, *or* under such conditions of use as are customary or usual." [Emphasis added.]

Thus if, as the jury here found, the use of the adulterated products not only caused harm but was in accordance with that "prescribed in the labeling," a violation of the Act would be established, quite apart from whether the conditions of use might be termed "customary or usual." The plain misreading of § 361 by the Fifth Circuit calls for review and correction.

Moreover, once such a violation of the Act has been shown, an important question is raised as to whether that violation constitutes negligence per se, eliminating the need either as a matter of federal law or under the applicable Oklahoma law for proof of the elements of due care and foreseeability—concepts that so deeply concerned the Fifth Circuit in this case. Indeed, the Fifth Circuit's refusal to so read the implications of a statutory violation and to apply those implications to this case directly conflicts with the Fourth Circuit's rulings in *Orthopedic Equipment Co. v. Eutsler*, 276 F.2d 455, 462, and *Gober v. Revlon, Inc.*, 317 F.2d 47, 51. In both these cases, the Fourth Circuit recognized that a violation of this Act constitutes negligence per se, making it unnecessary "to explain to the jury the elements

of due care and foreseeability." 276 F.2d at 462. Such a conflict makes it appropriate that this Court exercise its review powers in this instance.

CONCLUSION

For these various reasons, the writ of certiorari should issue to review the judgment below.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22567

HELENE CURTIS INDUSTRIES, INC. and COSMAIR, INC.,

Appellants,

versus

EDD PRUITT and MARJORIE ANN PRUITT,

Appellees.

Appeals from the United States District Court for the Northern District of Texas.

(October 20, 1967.)

Before RIVES, THORNBERRY and AINSWORTH, Circuit Judges.

THORNBERRY, Circuit Judge: This appeal is from a judgment of the United States District Court for the Northern District of Texas in favor of Appellee for personal injuries sustained while using a mixture of

Appellants' cosmetics. Appellee, Marjorie Ann Pruitt, sustained third-degree chemical burns on her scalp and right ear resulting from the application to her hair of a mixture of two products designed for bleaching purposes—"Helene Curtis New Blue Bleach," manufactured by Appellant Helene Curtis, and "L'Oreal Creme Developer," manufactured by Cosmair. The products were purchased from a beauty parlor in Terrell, Oklahoma, by a friend, Mrs. Hendren, who applied them to Mrs. Pruitt's hair at Mrs. Hendren's home in Terrell.

In response to special issues, the jury found that the Blue Bleach and Cosmair mixture "contained ingredients that were not suitable and reasonably fit for the purpose for which said products were used when used in combination with the other," and that such ingredients were a proximate cause of the injury. Both products were found to have contained "corrosive substances" (defined as "any substance which in contact with living tissue will cause destruction of tissue with chemical action") which were a proximate cause of the injury. Mrs. Pruitt was found to have followed the directions which accompanied the products and was found not to have been negligent in mixing or applying them. A verdict was returned in favor of Appellee in the amount of $64,500.00.

Appellants allege several grounds of error: (1) That the trial judge erred in not granting the motion for a directed verdict or motion for judgment

notwithstanding the verdict since the evidence was insufficient as a matter of law to establish a defect in the mixture; (2) that the trial judge erred in not granting a directed verdict or judgment notwithstanding the verdict since as a matter of law Mrs. Pruitt was without the class of persons who could invoke the doctrine of strict liability against Appellants; (3) that the trial judge erred in submitting the special issues on corrosiveness; and (4) that the verdict was excessive. We agree with Appellants that as a matter of law the jury could not have rationally inferred that the mixture was defective for its intended use. Alternatively, we hold that Appellee was without the scope of the duty which the doctrine of strict liability has imposed on Appellants. Only these two points will be discussed.[1]

I. The Applicable Law

The mandate of *Erie R.R. Co. v. Tompkins*, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, once again plunges this Court into the vexing and revolutionary

[1] Although we agree with Appellants that the trial judge erred in submitting the special issues on "corrosiveness," this point will not be fully discussed. The term "corrosive" is taken from the Federal Hazardous Substances Labeling Act, 15 U.S.C.A. § 1261, which specifically provides that a "hazardous substance" which is "corrosive" does not include foods, drugs and cosmetics which are subject to the Federal Food, Drug and Cosmetic Act, 15 U.S.C.A. § 1261(f)(2). Moreover, the composition of these cosmetics does not violate the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. § 361, which prohibits "adulterated cosmetics." In order for cosmetics to be "adulterated," they must cause harm under conditions of use which are prescribed by the directions and must be used in the customary and usual fashion. As our subsequent discussion will show, neither of those factors is present here.

field of products liability. The multi-state nature of the transaction necessitates a choice-of-law analysis. It is well settled that a federal court uses the substantive law of the state in which it sits and that under *Klaxon Co. v. Stentor Electric Mfg. Co.*, 1941, 313 U.S. 487, 61 S.Ct. 1020, substantive law includes the conflict-of-law rules. Although most courts in tort problems are moving away from the vested rights and territorial approach, Texas still follows the traditional *lex loci delictus* rule. *Makman v. Mustang Aviation, Inc.*, 416 S.W.2d 58 (Tex:Civ.App—Austin 1967, no writ). Here no injustice results from the application of this rule because there is no real conflict. *George v. Douglas Aircraft*, 2nd Cir. 1964, 332 F. 2d 76; Comment, 78 *Harv. L. Rev.* 1452 (1965). Both Texas and Oklahoma recently extended the scope of strict liability to emcompass all products that are unreasonably dangerous. The Texas Supreme Court, relying on the *Restatement of Torts* § 402A, adopted the tort theory of strict liability. *Shamrock Fuel & Oil Sales Company, Inc. v. Tunks*, 416 S.W.2d 779 (Tex. 1967); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967), *noted in* 45 *Texas L. Rev.* 790 (1967). The basis for the Oklahoma decision, *Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900 (Okla. 1966), is not clear, but the decisions relied on justify the conclusion that Oklahoma will also adopt the theory of strict liability in tort.

The mere adoption of strict liability for all products, however, does little to facilitate a solution to the issues posed by this appeal. These issues are the na-

ture and quantum of proof necessary to establish liability; a proper understanding of the concept of a defective product; and the scope of the maker's duty to the consumer. Thus, as in *Putnam v. Erie City Manufacturing Company*, 5th Cir. 1964, 338 F.2d 911, 917, we must consider "all the available data," including the restatements of law, treatises, law review commentary, and the majority rule.[2] Hopefully, our "*Erie* prediction" will be indicative of what Oklahoma will do in the future and will not be easily erased. *Ford Motor Company v. Mathis*, 5th Cir. 1964, 322 F.2d 267.

II. Policy Considerations

Initially, we review the policy considerations behind strict liability. With the technological revolution and modern marketing practices of this Century, Americans now enjoy the conveniences of many modern and beneficial products. These benefits to the many, however, have come at a high cost to a few. To combat the serious injuries visited on this minority, the law has reexamined its traditional reasons for imposing liability. This "rethinking" has caused many courts to abandon the traditional negligence analysis and impose liability without fault on the maker who puts the product into the stream of commerce.[3] The justification for rejecting privity is

[2] *See* Wright, *Federal Courts* § 58 at 206; Hart, *The Relations Between State and Federal Law*, 54 *Colum. L. Rev.* 489 (1954); *Note, How a Federal Court Determines State Law*, 59 *Harv. L. Rev. 1299* (1946).

[3] *E.g., Vandermark v. Ford Motor Co.*, 61 Cal. 2d 356, 391 P.2d 168; *Greeman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 377 P.2d 897; *Santor v. A. & M. Karagheusian,*

based on the realization that our technological society, with its proliferation of products and mass advertising, demands judicial protection of the consumer who has neither the capacity nor opportunity to discover latent dangers in products. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 *Minn. L. Rev.* 791 (1966). Several reasons have been advanced to justify this judicial pioneering: The maker impliedly represents that his product is fit for its intended use; consumer expectations are frustrated by harmful products; strict liability will make manufacturers more careful; and manufacturers are superior risk-bearers because they have the capacity to distribute the losses of the few to the many by the price mechanism. Wade, *Strict Tort Liability of Manufacturers*, 19 *Sw. L.J.* 5 (1965). Thus the risk of personal injury has become a cost of doing business. The more recent decisions have adopted a tort rather than a warranty approach, reasoning that recovery should not depend on the complex law of sales. *E.g.*, *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168 (1964); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967). These decisions find the tort theory more appropriate because liability is imposed by law and because the maker should not be permitted to define the scope of its responsibility for defective products. Comment,

44 N.J. 52, 207 A.2d 305 (1965); 2 *Frumer & Friedman, Products Liability* § 16A (1966); Keeton, *Products Liability —The Nature and Extent of Strict Liability*, 1964 *U. Ill. L.F.* 693; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *Yale L.J.* 1099 (1960).

Products Liability—Proceeding Apace, 33 *Tenn. L. Rev.* 341 (1966).

The particular market involved in this case is the cosmetics industry. In no other way can one glean a better conception of our "consumer perspective" than by considering the advertisements which constantly encourage women to beautify themselves. *See* 3 Frumer & Friedman, *Products Liability* § 2901 (1965); Cahn, *Law in the Consumer Perspective*, 112 *U. Pa. L. Rev.* 1 (1963). It is therefore understandable that courts have imposed strict liability on the cosmetics manufacturer who has bombarded the consumer with his impersonal merchandising techniques. Cowan, *Some Policy Basis of Products Liability*, 17 *Stan. L. Rev.* 1077 (1965). The mere imposition of strict liability on cosmetics makers does not, however, as the trial court's charge assumed, mean that the maker is liable for any harm to anybody under any circumstances. In fact, the ambit of responsibility is more circumscribed. The maker is not an absolute insurer who is responsible for all physical hurts occurring in the course of using the product. Traynor, *The Ways and Meaning of Defective Products and Strict Liability*, 32 *Tenn. L. Rev.* 363 (1965); Freedman, *"Defect" in the Product: The Necessary Basis for Products Liability, in Tort and in Warranty*, 33 *Tenn. L. Rev.* 323 (1966). The question facing courts today is what doctrine will replace fault as a means of delimiting liability. The chief limitation (which was accepted by the Oklahoma Supreme Court in *Marathon*) is the requirement that the product be defective for its intended use. The *Restatement*

of Torts § 402A provides a lucid definition: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer."

Demanding that the defect render the product unreasonably dangerous reflects a realization that many products, such as cosmetics, have both utility and danger. James, *Products Liability, Texas L. Rev.* 114 (1955). Since, in the instant case, there was no evidence of any miscarriage in the production and no foreign substance was found in either product, we are confronted with what has been termed a design problem: The product was exactly as intended and yet harm still occurred. *See Wade, supra.*[4] For the design to be unreasonably dangerous, it must be so dangerous that a reasonable man would not sell the product if he knew the rists involved. *Id.* at 10. This definition demonstrates that the only change from the traditional negligence analysis is that the maker cannot be excusably ignorant of the defect; however, courts must still weigh the utility of the product against the risk of harm created. *Id.* at 16. The trial court's submission of strict liability ignores these principles.

[4] The alleged defect here is not therefore what has been termed a miscarriage in the manufacturing process, i.e., that the product has unintended features. Either something goes wrong in the production process or some foreign substance is found in the product. In those situations it has been much easier for courts to conclude that the defect is unreasonably dangerous. *See Paul v. Rodgers Bottling Co.*, 6 Cal. Rep. 867 (Ct. App. 1960) (mouse in Coca Cola bottle); *Kroger Co. v. Bowman*, 311 S.W.2d 339 (Ct. App. Ky. 1967) (bottle explosion).

III. Federal Test for the Sufficiency of the Evidence

It should be evident from the foregoing definition of a defect that the test for the sufficiency of the evidence is of paramount importance. This Court recently reaffirmed in *Planters Manufacturing Co. v. Protection Mutual Insurance Co.*, 5th Cir. No. 23019, May 26, 1967, the principle that although state law governs the elements of a cause of action, the sufficiency of the evidence is a matter of federal law.[5] This doctrine has been formulated to protect the seventh-amendment right to a jury trial by demanding uniformity in the exercise of the power of the trial judge to grant directed verdicts. 2B. Barron & Holtzoff, *Federal Practice and Procedure* § 871.1 at 18 (Wright ed. 1961). Accordingly, since the federal policy favors jury trials, we must approach Appellants' complaint that the trial judge erred in not granting these motions with the realization that they should be granted sparingly. *Id.* at 375.[6]

The test employed by the Fifth Circuit is that a fact issue must be submitted to the jury if reasonable men could differ on the conclusions to be reached

[5] *See Isaacs v. American Petrofina*, 5th Cir. 1966, 368 F.2d 193; *Shircy v. Louisville & Nashville Railroad Co.*, 5th Cir. 1964, 327 F.2d 549; *Hogan v. United States*, 5th Cir. 1963, 325 F.2d 276; *Reuter v. Eastern Airlines*, 5th Cir. 1955, 226 F.2d 443, 445.

[6] For examples of decisions ignoring this principle and their summary reversal by the Supreme Court, see *Swafford v. Atlantic Coast Line R. Co.*, 1955, 350 U.S. 807, 76 S.Ct. 80, 100 L.Ed. 725; *Union Trust v. Eastern Air Lines, Inc.*, 1955, 350 U.S. 907, 76 S.Ct. 192, 100 L.Ed. 796; *Williams v. Carolina Life Ins. Co.*, 1954, 348 U.S. 802, 75 S.Ct. 30, 99 L.Ed. 633.

from the evidence presented. *Isaacs v. American Petrofina*, 5th Cir. 1966, 368 F.2d 193; *Wells v. Warren*, 5th Cir. 1964, 328 F.2d 666. We must view the evidence and all reasonable inferences most favorably to the party against whom the motion is made. Moreover, only the evidence and the reasonable inferences which support Appellee's theory may be considered. *Wilkerson v. McCarthy*, 1949, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 479; *Berry v. United States*, 1941, 312 U.S. 450, 61 S.Ct. 637, 85 L.Ed. 945. Indeed, after *Planters* our sole function is to ascertain if there is a *rational basis in the record* for the jury's verdict. The *Planters* decision, however, provides no explicit help in determining which inferences are rational. The polar ends of this problem may be stated as follows: *Planters* holds that an inference may be reasonable though based partly on conjecture;[7] it is not, however, unconstitutional to direct a verdict for the

[7] In *Planters* we moved away from the absolute position which condemns jury speculation and adopted the reasoning of *Lavender v. Kurn*, 1946, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916, that in matters of judgment there will always be some measure of speculation. Specifically what *Planters* abandoned was the "equally probable rule." That rule had said that when two explanations are equally probable they are the legal equivalent of no evidence. *Sherman v. Lawless*, 8th Cir. 1962, 298 F.2d 899, 902; *Sheptur v. Procter & Gamble Distributing Co.*, 6th Cir. 1958, 261 F.2d 221. We rejected the more-probable-than-not rule because it injected a specious mathematical precision into matters of judgment. Comment, *Directed Verdicts and the Right to Trial by Jury in Federal Courts*, 42 *Texas L. Rev.* 1053, 1062 (1964). There is no doubt that the rejection of the more-probable-than-not rule changes the law in the majority of decisions concerning products liability which have been cited to us on this appeal. *Vandercook & Son, Inc. v. Thorpe*, 5th Cir. 1963, 322 F.2d 638; *Carlson v. Chisholm-Moore Hoist Corp.*, 2d Cir. 1960, 281 F.2d 766; *Sheptur v. Procter & Gamble Distributing Co.*, 6th Cir. 1958, 261 F.2d 221; *Jakubowski v. Minnesota Mining and Mfg. Co.*, 42 N.J. 177, 199 A.2d 826 (1964).

defendant, *Galloway v. United States*, 1943, 319 U.S. 372, 63 S.Ct. 1077, and it seems well settled that an inference is unreasonable if it is at war with uncontradicted or unimpeached facts. *See Parker v. Wideman*, 5th Cir., 1967, 380 F.2d 433; 2B *Barron and Holtzoff, supra*, at 390. The proper blending of these two polar positions can only be accomplished by understanding that the basic question is one of policy: How far is the court willing to let the jury speculate? Comment, *Directed Verdicts and the Right to Trial by Jury in Federal Courts*, 42 *Texas L.Rev.* 1053, 1063 (1964).

In deciding how much the jury can speculate it is well settled that an appellate court cannot weigh the evidence or the credibility of the witnesses. *Wells v. Warren, supra*. The line of demarcation which we are required to walk is ephemeral: We must conclude that an inference is unreasonable without falling into the trap of weighing all the evidence and deciding that while the jury's inference is reasonable, the evidence shows that another inference is just as reasonable, if not more so. 2B *Barron & Holtzoff, supra* at 392. It is only to that limited extent that all the evidence is considered.

IV. Proof Required for Recovery Under Strict Liability

The doctrine of strict liability only removes the requirement of privity of contract; it does not prove Appellee's case. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 *Minn. L. Rev.*

791, 840 (1966). Since there was no direct evidence of an identifiable defect, we must decide the meaning of a rational inference in a products liability case which rests entirely on circumstantial evidence. The breach of duty which the jury would have had to infer was that the New Blue Bleach and L'Oreal were unreasonably dangerous for their intended use. As stated, in order to justify that finding the jury must have concluded that the products were so dangerous that a prudent maker would never have marketed the products had he known of their condition. Such a conclusion would be reasonable only if the jury could have concluded that the mixture was defective; that the products were intended to be mixed; that the application by Mrs. Hendren comported with professional standards; and, finally, that Appellee's scalp was not hypersensitive. We have not considered the issue urged by Mrs. Pruitt that she was inadequately warned of danger. The jury found that the warnings to Appellee for use were inadequate, but that this failure was *not* the proximate cause of the injuries. Since Appellee failed to move for a directed verdict in the trial court, she cannot now challenge the sufficiency of the evidence. *See* 2B *Barron & Holtzoff, supra* at 424.

A. Appellee's proof about the mixture.

First, we consider the proof offered by Appellee on the dangerous qualities of the mixture. Appellee elicited testimony that the directions accompanying the Helene Curtis bleach were followed.[8] Most important

Directions

Helene Curtis new blue bleach

1 BEFORE ANY APPLICATION

1. Examine the scalp for cuts, eruptions, abrasions, and abnormal conditions. If any such condition exists, or if the scalp is sensitive, do not use this product.
2. Do not preshampoo, brush or massage the hair or scalp for at least 24 hours prior to treatment.
3. Do not mix Helene Curtis New Blue Bleach with anything except Helene Curtis Creme Developer (or a good grade of fresh 20 volume hydrogen peroxide.)

NOTICE: Like the purest of foods, drugs and cosmetics, Helene Curtis New Blue Bleach may nevertheless cause an allergic response in a susceptible person. If scalp irritation is noted, stop using the product until it has been determined by proper patch test that the reaction is not due to an allergy.

2 PRELIMINARY STRAND TEST

A preliminary strand test is practical as well as professional for it permits the predetermination of the effect of Helene Curtis New Blue Bleach on the hair. A test is especially important on hair which has been treated previously (dyed, tinted, bleached, colored with metallic salt preparations, waved, etc.).

1. Using a glass or plastic dish only, mix two level teaspoonfuls of Helene Curtis New Blue Bleach with three teaspoonfuls of Helene Curtis Creme Developer (or a good grade of fresh 20 volume hydrogen peroxide.) Stir to a smooth creamy consistency.
2. Apply this mixture generously to a small strand of hair at the area of the patron's head where the hair is darkest. If the entire head is to be bleached, apply to the complete strand. If a retouch, apply to the new growth only. Watch the action closely. When the desired shade is achieved, note the elapsed time. Rinse the hair thoroughly with lukewarm water and then dry it.
3. By noting the shade you can decide if the timing is proper or whether more or less timing is needed before bleaching the entire head. Examine the test strand carefully to determine the hair condition and uniformity of color. If any section of the hair is darker, the bleach mixture should be applied to this section first when making the bleach application to the entire head. If discoloration or breakage occurs do not proceed with the bleaching treatment without first reconditioning and retesting the hair.

3 ASSEMBLE EVERYTHING YOU NEED

1. Helene Curtis New Blue Bleach.
2. Helene Curtis Creme Developer (or a good grade of fresh 20 volume hydrogen peroxide.)
3. Hair coloring brush.
4. Glass or plastic bowl.
5. Rubber gloves (wear them throughout the bleaching treatment and the after-shampoo to protect the hands).

4 PREPARATION OF THE MIXTURE

(Follow illustrated directions on inside)

5 APPLICATION TO HAIR WHICH HAS NOT BEEN BLEACHED PREVIOUSLY

(Follow illustrated directions on inside)

6 RETOUCH APPLICATION

(Follow illustrated directions on inside)

7 DO'S AND DONT'S

1. Do follow all directions carefully.
2. Don't brush or pre-shampoo the hair the day it is bleached.
3. Do wear rubber gloves.
4. Do prepare the mixture immediately before application and apply at once.
5. Do use only Helene Curtis Creme Developer (or a good grade of fresh 20 volume hydrogen peroxide).
6. Don't use Helene Curtis New Blue Bleach on eyelashes or eyebrows, since there is no safe method of predetermining the possible supersensitivity of the more delicate orbital areas or optic tissues.
7. Don't permit Helene Curtis New Blue Bleach to contact the areas in and around the eyes.
8. Don't use this product without making the preliminary strand test to ascertain that the hair is in condition for treatment without discoloration, damage or other unwanted results.
9. Don't proceed with the treatment if the scalp has cuts, eruptions or abrasions, or if hair breakage or discoloration occurs during the preliminary strand test.
10. Do confine the mixture to the hair only. If it touches the skin around the face remove it immediately with absorbent cotton soaked in water.
11. Do use only lukewarm water when rinsing the mixture from the hair.
12. Don't use contents of this package after the expiration date stamped on the carton.
13. Don't prepare or store any Helene Curtis New Blue Bleach-peroxide mixture in a closed container. Hydrogen peroxide rapidly releases oxygen when mixed, RESULTING IN PRESSURE WHICH MAY RUPTURE THE CONTAINER.
14. Do discard all unused portions of the mixture.
15. Don't substitute ordinary hydrogen peroxide, or use a peroxide of higher or lower volume. Use only Helene Curtis Developer made specially for hair coloring and hair lightening (or a good grade of fresh 20 volume hydrogen peroxide).

Pls' Ex. No. 2, Defs' Ex. No. 1

is the fact that Mrs. Hendren checked Appellee's scalp and found no cuts, eruptions, abrasions, or other abnormal conditions which rendered the hair unsuited for bleaching; that the hair had not been shampooed, brushed or massaged in the twenty-four hours prior to treatment; that a preliminary strand test showed no harmful effects to the hair by the mixture; and that the proper proportions of the products were used. Appellee also had evidence about the nature of the bleaching process. It was shown that the mixture of the two products produced a liberation of oxygen from the hydrogen peroxide. This process burned the hair pigment until it was colorless. It also had the potential for causing harm if the mixture was too toxic or left on the hair too long. Mr. Anderson, an analytical chemist, testified about the chemical qualities of the mixture. He had conducted experiments on the products to ascertain the active ingredients.[9] He admitted that there was a chemical burn, but he was unable to say what caused the burn. He did testify that the mixture would have had to be much stronger than the ones he tested to cause Appellee's burn. His conclusions were based on the fact that the concentration of the peroxide, which he thought was the dangerous ingredient, was normal. Finally, he stated that he did not think a bobby pin or cut on the head could have increased the activity of the products enough to cause this burn.

[9] The experiments were not conducted on the products which allegedly injured Mrs. Pruitt because Mrs. Hendren threw them away.

Appellee also obtained the statement from Mr. Dieter, a cosmetic chemist for Helene, that in order to produce such a burn the products either had to be defective or the directions not followed. Dr. Majors, Appellee's personal physician, testified that in his opinion the burn happened suddenly. By this statement he meant about fifteen minutes. It was shown that the solution was on Mrs. Pruitt's head about fifteen to twenty minutes before the burning started. Dr. Majors also testified that he did not believe a cut could produce this burn. His subsequent testimony is the most interesting. He stated that he thought one of two things happened: There was either some mislabeling of one of the bottles so that the solution or the powder was not what was usually in the products, or the directions were not followed properly. He concluded that it was his opinion that this "chemical burn was produced by the application of the bleaching substance she told me she used on her scalp."

On the basis of this testimony, Appellee asserts that the defect in the mixture speaks for itself. Although the trend has certainly been to allow more and more circumstantial evidence to serve as the basis for liability, we believe that in this instance a finding of a defect was unwarranted. The evidence about the character of the mixture and its propensities for harm does not suggest a defect. The cornerstone rule in products liability is that proof of mere injury furnishes no rational basis for inferring that the prod-

uct was defective for its intended use.[10] Appellee has attempted to skirt that principle by invoking the doctrine of *res ipsa loquitur*. Certainly this doctrine has produced the most situations in which the jury has been allowed to infer negligence from an unexplained accident. Several elements must be present before the doctrine is applicable: The accident must be one which would not ordinarily occur without the presence of negligence; the plaintiff must show that the product was properly handled after it left the maker's possession; and, finally, plaintiff must prove that the product has not been substantially altered after leaving the maker's control.[11] Generally, the plaintiff is required to exclude these other causes by a preponderance of the evidence. *Dement v. Olin-Mathieson Chemical Corp.*, 5th Cir. 1960, 272 F.2d 76; *Ozark v. Wichita Manor, Inc.*, 5th Cir. 1958, 252 F.2d 671. This preponderance-of-the-evidence test was employed because the courts looked to state law for the applicability of the doctrine. Since this state rule conflicts with the federal test, this Court will no longer rely solely on state law to determine the applicability of *res ipsa loquitur*. *See* 2B *Barron & Holtzoff, supra*, at 18. All that is in issue is the sufficiency of the evi-

[10] *See Carlson v. Chisholm-Moore Hoist Corp.*, 2d Cir. 1960, 281 F.2d 766; *Scientific Supply v. Zelinger*, 139 Colo. 568, 341 P.2d 897 (1959); *Patterson v. Meyer, Inc.*, 189 Kan. 501, 370 P.2d 116 (1962); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 696 (1960).

[11] *Dement v. Olin-Mathieson Chemical Corp.*, 5th Cir. 1960, 282 F.2d 76; *Evangelio v. Metropolitan Bottling Co.*, 339 Mass. 177, 158 N.E.2d 342 (1959); *J. C. Penney Co. v. Hoover*, 414 P.2d 293 (Okla. 1966); *Michel v. Branhan*, 327 P.2d 440 (Okla. 1958); *Haas v. Carrier Corp.*, 339 S.W.2d 227 (Tex.Civ.App.—Houston 1960, writ ref'd n.r.e.).

dence to infer a defect in a product.[12] The factors considered in deciding whether the doctrine applies are still relevant; the only thing that has changed is the quantum of proof necessary to negate the other explanations of the injury.[13]

We agree with Appellants' assertion that when circumstantial evidence is the only proof, courts have infrequently inferred negligence (here a defect) simply from the accident and proof of careful conduct by the plaintiff, and then only in instances where the accident is the type which, standing alone, points an accusing finger at the maker. Furthermore, in all these cases the chance of mishandling is improbable.[14] It is a matter of common knowledge that cosmetics can

[12] *Hanna v. Plumer*, 1965, 380 U.S. 460, 85 S.Ct. 1137; *Simler v. Conner*, 1963, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691; *Dick v. New York Life Ins. Co.*, 1959, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935; 1 *Barron & Holtzoff, Federal Practice and Procedure* § 138 at 591 (Wright ed. 1961).

[13] For the decisions looking to state law see *Vandercook & Son, Inc. v. Thorpe*, 5th Cir. 1963, 322 F.2d 638, 644; *Murphy v. St. Paul Fire & Marine Ins. Co.*, 5th Cir. 1963, 314 F.2d 30; *Robinson v. Reed-Prentice Corp.*, 9th Cir. 1961, 286 F.2d 479; *Employer's Liability Assurance Corp. v. Thomassie*, 5th Cir. 1961, 239 F.2d 110. Some indication of our present holding can be found in *Otis Elevator Co. v. Robinson*, 5th Cir. 1961, 287 F.2d 62, 65. There the Court reasoned that the sufficiency of the evidence tests had never been limited to the narrow confines of the *res ipsa loquitur* doctrine.

[14] See *Putnam v. Erie City Manufacturing Co.*, 5th Cir. 1964, 338 F.2d 911 (defective wheel chair); *Dement v. Olin-Mathieson Chemical Corp.*, 5th Cir. 1960, 282 F.2d 76 (dynamite explosion); *Evangelio v. Metropolitan Bottling Co.*, 339 Mass. 177, 158 N.E.2d 342 (1959) (bottle explosion); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 697 (1960) (car suddenly veered off the road); *Marathon Battery Co. v. Kilpatrick*, 418 F.2d 900 (Okla. 1966) (battery explosion); *Hewitt v. General Tire & Rubber Co.*, 3 Utah 2d 354, 284 P.2d 471 (1955) (tire blowout).

never be made completely safe for all users and can cause injuries for many reasons other than a defect in the product. Since injuries can be caused by the toxicity of the chemicals, contact with other products, the method of application, or an allergic condition, the circumstances do not point an accusing finger at the manufacturer. *See Ravo v. Lido,* 236 N.Y.S. 2d 135 (Sup. Ct. 1962).

In the instant case Appellee has failed to prove that it was the toxicity of the products which caused the injury rather than the other factors just enumerated. The testimony about the burning quality of the products is patently inadequate. This burning quality resulted from the oxidation process which occurred when the bleach and peroxide were mixed. No liability can be based on this burning potentiality since the very process of bleaching hair involves a chemical reaction or oxidation process by which the color in the hair is destroyed. It takes a powerful chemical to accomplish the decolorization. As one court observed, the sale as a bleaching fluid of a product that did not bleach would itself constitute a breach of warranty. Thus the very ingredient and quality which makes the fluid harmful if improperly used is the ingredient and quality which makes it fit for the purposes for which it was purchased. *Landers v. Safeway Stores, Inc.,* 139 P.2d 788 (Ore. 1943). When products contain dangerous ingredients which are natural or inherent, courts have usually held that the product is not defective. *Zorger v. Hillman's,* 287 Ill. App. 357, 4 N.E.2d 900 (1936). It is only when the manufacturer

could not reasonably expect the consumer to discover the natural substance in the final product that liability has resulted. *Bennett v. Pilot Products Co.*, 120 Utah 474, 235 P.2d 525 (1951); *Betehia v. Cape Cod Corp.*, 10 Wis. 2d 323, 103 N.W.2d 64 (1960). In the instant case we cannot say that Appellee did not know that the bleaching process and its natural ingredients were intended to decolor her hair.

The other proof on the character of the mixture is just as equivocal. *See e.g., Rexall v. Nihill*, 9th Cir. 1960, 276 F.2d 637; *Benavides v. Stop & Shop, Inc.*, 190 N.E.2d 894 (Mass. 1963). The two statements that the products were either defective or misapplied do nothing to exclude each other. Dr. Major's statement that the "application of the bleaching solution" caused the burn is the most interesting. In *Zampino v. Colgate-Palmolive Peet Co.*, 8 A.D.2d 304, 187 N.Y.S.2d 25 (1959), the plaintiff obtained a similar statement from a doctor to show that the aluminum sulfate in Veto deodorant was harmful. The court held that the statement amounted to no evidence of the fact that some ingredient in the product was harmful. Of course the application of the bleaching solution in the instant case caused the injury. The only circumstance in which this statement could conceivably support recovery would be one in which *res ipsa liquitur* was applicable. Here, however, it provides no basis for the inference that it was the nature of the mixture rather than the method of the applier which caused the burn. *Hanrahan v. Walgreen Co.*, 243 N.C. 268, 90 S.E.2d 392 (1955).

Nor do all the statements stand alone. We present the following discussion as additional support for our holding that as a matter of law these products were not in a defective condition which was unreasonably dangerous for their intended use. Appellee's problem is that she has not presented enough facts to constitute a cause of action in strict liability. *Cf. Fidelity and Casualty Co. of New York v. Funel*, 5th Cir., No. 23285, Sept. 26, 1967. In all the other cases considered, the proof presented by the plaintiff was sufficient to make out a cause of action, despite conflicting evidence. *Dick v. New York Life Ins. Co.*, 1959, 359 U.S 437, 79 S.Ct. 921, 3 L.Ed.2d 935; *Berry v. United States*, 1941, 312 U.S. 450, 61 S.Ct. 637, 85 L.Ed. 945. Our approach does not weigh the evidence or the credibility of the witnesses; we simply assert that the evidence about the characteristics of the mixture is not sufficient to constitute a cause of action in strict liability.

B. The Intended Use Doctrine: The Illegal Mixture.

In the first place, Mrs. Pruitt has not established a cause of action because she has not shown that the mixture of these products was intended. This fact had to be established because a product is not defective unless injury occurred during an intended use. *Lartigue v. Reynolds Tobacco Co.*, 5th Cir. 1963, 317 F. 2d 19; *Spruille v. Boyle-Midway, Inc.*, 4th Cir. 1962, 308 F.2d 79. The directions on each package suggest that the mixture was not intended. The "New Blue Bleach" said: "Do not mix Helene Curtis New Blue Bleach with anything except Helene Curtis Creme De-

veloper (or a good-grade or fresh 20 volume hydrogen peroxide)." It is undisputed that Cosmair peroxide is a *cream* rather than *hydrogen* peroxide. The label on the Cosmair bottle said: "For tinting or bleaching, use Oreor exactly as you would use 20-volume peroxide with Imedia Petite, Imedia Petite Excellence, Imedia Creme, Super Blue Creme Oil Lightener." It is undisputed that Helene's product is none of the above.

Mr. Dieter, the cosmetic chemist for Helene, compared the peroxides. He stated that Hydrogen peroxide has the viscosity of water while the cream peroxide is similar to hand lotion. The cream peroxide contains additives which thicken the product and also provide some emollients or conditioning actions when used on the hair. He stated further that there was definitely a physical difference between the products, but his company had no way of ascertaining the chemical differences since the formula for the Cosmair product was a trade secret. Because of the uniqueness of cream peroxide, Mr. Dieter stated that Helene recommended that a hydrogen peroxide be used when Helene's own Cream Developer was not used, since there is nothing unique about a hydrogen peroxide. Cosmair's expert agreed that the trade secrets made it impossible to know about the products' compatibility; that the directions were meant to be followed; and that he did not recommend that the products be used together. Appellee has suggested that these directions serve both commercial and safety ends. Although they may have a dual nature, the de-

cisions demonstrate that a failure to follow directions cannot support a finding of a defect. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 *Minn. L. Rev.* 791, 824 (1966). Indeed, instructions accompanying cosmetics are an integral part of the warranty and are to be strictly followed. *E. I. DuPont De Nemours & Co. v. Baridon*, 8th Cir. 1934, 73 F.2d 26. This principle is particularly applicable to a bleaching product which has the inherent danger of burning the scalp or hair if misapplied in any way. Furthermore, directions become more important when products are to be mixed. All the relevant decisions presented evince a hesitancy to hold the maker responsible when mixtures are involved. No doubt many of the plaintiffs' problems in these cases stem from the requirement that the other possible causes be negated by a preponderance of the evidence. But aside from the preponderance-of-the-evidence approach, which we have rejected, these decisions reflect the valid policy concern for the potential abuses of jury speculation when mixtures are the cause of injury. What these decisions justifiably demand is that there be a rational basis in the record from which the jury can make a selective choice between the products before the manufacturer can be held responsible for the harm caused by his product or the mixture. *See Bathory v. Procter & Gamble Distributing Co.*, 6th Cir. 1962, 306 F.2d 22; *Sheptur v. Procter & Gamble Distributing Co.*, 6th Cir. 1958, 261 F.2d 221; *Harrod, et al v. Tower Co.*, 194 N.E.2d 392 (Mass. Super. Ct. 1963). This requirement is all the more warranted when the products in-

volved were never meant to be used together. Unlike the case of *Ozark v. Wichita Manor, Inc.*, 5th Cir. 1958, 252 F.2d 671, in which component parts were used to produce a final product, it is clear in the instant case that the products involved were not marketed for that purpose.

Nor can it be said that Appellants should have foreseen the mixture, since the trade secrets of one maker prevented any safety tests on the product of the other. Manufacturers cannot be responsible for a combination which they did not recommend and which they had no way of guarding against at the manufacturing stage. *Lartigue v. Reynolds Tobacco Co.*, 5th Cir. 1963, 317 F.2d 19. Moreover, the mixing of these products amounted to an abnormal handling or substantial alteration which, because it was unintended and unforeseen, excuses the makers from responsibility for any harm. Noel, *Manufacturers Negligence of Design or Directions for Use of a Product*, 71 *Yale L.J.* 816 (1962); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 *Minn. L. Rev.* 791 (1966).

C. **The Intended Use Doctrine: The Intended User.**

Appellee has argued that she did not know the difference between hydrogen and cream peroxide. This argument reveals her second misconception about proof of a defect. Mrs. Pruitt has assumed that this product was made for her use and has argued that the directions were inadequate for the ordinary

consumer. The uncontradicted evidence, as subsequently shown, confirms, however, that these products were intended to be used by a professional beautician. Since the decisions indicate that the maker is liable only to those whom it can reasonably expect to use its product, Mrs. Pruitt cannot recover. *Merrill v. Beaute Vues Corp.*, 10th Cir. 1956, 235 F.2d 893; *Bronson v. J. L. Hudson Co.*, 135 N.W.2d 388 (Mich. 1965).

Appellee's counter argument reveals the final fallacy in her position. Mrs. Pruitt asserts that a professional beautician in Terrell had mixed these two products and that the professional beautician who testified had done the same. Before these facts can become important, Appellee must show that Mrs. Hendren's method of application met professional standards. Our requirement that Appellee prove that Mrs. Hendren applied the mixture as a professional is justified by the conclusion that these were not over-the-counter products, nor was Mrs. Pruitt the intended user. Accordingly, evidence which shows that harm was suffered when the products were used by a layman does not necessarily demonstrate that the products would have been defective if applied by a professional. *Parker v. State*, 201 Misc. 416, 105 N.Y.S.2d 735, 741 (1959). This proposition is valid since it is well settled that a product cannot be deemed defective if proper application would eliminate the possible dangers.

Mrs. Hendren had seen the "FOR PROFESSIONAL USE ONLY—NOT FOR PUBLIC SALE" language on

the Helene bleach. Her understanding of this language was that if you did not know how to use these products you had better leave them alone. (R. 184) She admitted that she had no professional training. However, she had once lived near a beautician student and had used her books and practiced on her. She said she had used the mixture in question on two previous occasions. She related the following events concerning the accident: Before applying the solution she had checked the scalp and found no cuts or abrasions. She admitted that the solution touched the ears but contended there was no way to avoid the contact. Furthermore, she had tried to wipe off the solution whenever it touched the skin. The solution was first applied to the outer parts of the hair. At that time she tested the hair and decided it was not bleaching very fast, so she went to fix some iced tea. Mrs. Hendren finished her tea and then proceeded to apply the solution down to an inch of the scalp. It was during this final application that Mrs. Pruitt complained of a burning sensation. Mrs. Hendren immediately washed off the solution and called Dr. Majors.

On the basis of this testimony, the jury concluded that Appellee and Mrs. Hendren followed the directions contained on the products when mixing and applying them. The uncontradicted testimony of a professional beautician, however, was that a professional would have taken precautions in addition to those prescribed by directions. This evidence was elicited from Mrs. Nickerson, an instructor at Bud's Hall Beauty

College. This witness' conception of a "professional application" is far different from the picture drawn by Mrs. Hendren of two friends reading the directions from only the Helene package and drinking iced tea as the solution was applied. In order to acquire a license, a beautician must complete a course of one thousand hours, 475 of which are related to the process of bleaching hair. According to the professional witness, burning is the most common danger and one must therefore take precautions against leaving the solution on too long. A professional never depends on the customer's complaints and constantly surveys the hair to detect burning. This burning can be detected by holding the hand over the head. Burning can also be seen when the solution starts to move away from the scalp or bubble. The professional would also have taken a strand test every five minutes to determine whether the hair and the solution were reacting favorably. On a virgin head, like Mrs. Pruitt's, the solution should be removed and a new application used before the mixture is applied next to the scalp. In order to prevent the mixture from touching the ears, cotton could be packed around them. Finally, the theory book used by Mrs. Nickerson provided that a patch test should always be taken of a virgin head to determine whether the customer might be allergic to the product.

These additional safety precautions would have materially lessened the chance of injury. It is this uncontradicted testimony which nullifies the statements that the products were either defective or misapplied.

Moreover, these additional safety precautions illustrate that written directions do not give all of the safety procedures which the intended user would have applied. Appellants were justified in anticipating these professional methods, since it is well settled that a manufacturer has the right to expect that his product will be used in the normal and customary fashion. *McCready v. United Iron & Steel Co.*, 10th Cir. 1959, 272 F.2d 700; *Bennett v. Pilot Products Co.*, 120 Utah 474, 235 P.2d 525 (1951). When these products were marketed, the makers could only foresee that they would be applied by a trained beautician. Therefore, the directions had to be adequate only for the professional's use. *Taylor v. Jacobson*, 147 N.E.2d 770, 775 (Mass. 1958). It is also clear that the maker must give directions which will be adequate in light of the intended users' training, *Patterson v. George H. Weyer, Inc.*, 189 Kan. 301, 370 P.2d 116 (1962), and does not have to warn against dangers which are generally known. *Jamieson v. Woodward & Lathrop*, D.C. Cir. 1957, 247 F.2d 23; *Parker v. State*, 201 Misc. 416, 105 N.Y.S. 2d 741 (1951). Thus, Mrs. Hendren's methods amount to the conduct of an atypical user and render the finding of a defect in the products irrational. This abnormal handling could not have been foreseen, and it was a substantial alteration of the method of application.

Finally, the problem of allergic users and hypersensitive people is a recurring one in the area of strict liability for cosmetics. As one commentator has asserted, products which involve chemical reaction

never have any tests which can guarantee absolute safety to all the consuming public. Whitemore, *Allergies and Other Reactions Due to Drugs and Cosmetics*, 19 *Sw. L.J.* 76 (1965). Oklahoma law indicates that an allergic plaintiff cannot invoke strict liability. *Merrill v. Beaute Vues Corporation*, 10th Cir. 1956, 235 F. 2d 893; *John A. Brown v. Shelton*, 391 P.2d 259 (Okla. 1964). Appellee has attempted to show that her skin is normal. None of her evidence was connected to the prior use of these products. Some courts indulge in a presumption that the skin is normal. *Jacquot v. Filene's Sons Co.*, 337 Mass. 312, 149 N.E.2d 635 (1958). Although this presumption would usually be reasonable, it cannot apply here. As admitted by Dr. Majors, the only way of ascertaining whether Mrs. Pruitt was allergic to this particular mixture would be a test using these products. This is the function of the patch test which the professional would have performed. In such a situation, to presume that the skin is normal would be contrary to common sense. This conclusion is reinforced by the additional factors that the products were mixed contrary to directions and applied by a novice. Therefore it cannot be said that Appellee has established any rational basis for excluding the possibility of a hypersensitive reaction.

On the basis of the foregoing factors, we hold that Appellee has established no legitimate basis from from which the jury could rationally infer that Mrs. Pruitt negated the other possible causes of injury. *Bronson v. J. L. Hudson Co.*, 135 N.W.2d 388 (Mich. 1965); *John A. Brown v. Shelton*, 391 P.2d 259 (Okla.

1964). A federal court does not function as a mere automaton in protecting seventh-amendment rights. Instead, its paramount function is to see that justice is done. *Reuter v. Eastern Air Lines*, 5th Cir. 1955, 226 F.2d 443. Pursuant to that policy, we feel justified in holding that the evidence produced by Appellee would allow jury speculation beyond the limits envisioned by *Planters*. *See Fidelity & Casualty Co. of New York v. Funel*, No. 23285, 5th Cir. September 26, 1967; *McPherson v. Tamiami Trail Tours, Inc.*, No. 23452, 5th Cir., July 6, 1967; *Huffstutler v. Hercules Powder Co.*, 5th Cir. 1962, 305 F.2d 292; *Thomas v. Atlantic Coast Line Railroad Co.*, 5th Cir. 1955, 223 F.2d 1; *McMeekin v. Gimble Brothers, Inc.*, W.D. Pa. 1963, 223 F. Supp. 896.

V. The Scope of the Duty Imposed by Strict Liability

The favored policy of jury trials in federal courts compels articulation of the other basis for our holding that Appellee should take nothing. Even if the jury could have properly found the mixture defective, there are additional obstacles to recovery. Specifically, the question presented is whether Appellants are responsible for the sale by the beauty shop to Appellee. What must therefore be decided is whether Mrs. Pruitt was a foreseeable user and whether the sale by the shop was foreseeable.

There is no "true rule" which will prevent the prostitution of the doctrine of strict liability into a form of absolute liability under which the maker is liable for

all accidents resulting from unknown causes. Indeed, whether the ambit of responsibility will be the same as it is in negligence cases is still unsettled. Courts have attempted to answer this problem by resorting to the intended use doctrine. This doctrine is composed of two factors: The marketing scheme of the maker and foreseeability of harm. Courts have defined foreseeability as the kinds of risks which the enterprise is likely to create, *Lartigue v. Reynolds Tobacco*, 5th Cir. 1963, 317 F.2d 19, or those risks which are inherent in the proper use of the products for the purposes for which they were intended. *Spruille v. Boyle Midway, Inc.*, 4th Cir. 1962, 308 F.2d 79. It is these normal consequences which are a cost of doing business.

The dual concept of appropriate use and foreseeability of harm is traceable to *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 268, 161 A.2d 696 (1960). The court asserted that the interests of the person who could reasonably be contemplated to use the product demanded that society remove the doctrine of privity as a defense. This decision rested on the policy that it would be unjust to allow the maker to create a demand for the product by mass advertising and then evade liability with the shield of privity. *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W. 2d 828 (1942).

The scope of responsibility envisioned by *Henningsen* is still in conflict. The battle has been waged around the rights of the innocent bystander who is

neither a consumer nor user of the products. Some courts have focused on the advertising and marketing rationales of strict liability to deny the bystander recovery. These courts reason that since the bystander is not in the distribution chain he has no reason to expect protection from harm caused by the product. To them privity has been abandoned only in the marketing sense and there must still be some nexus between the maker and the injured party besides the injury. Comment, *Products Liability—Proceeding Apace*, 33 *Tenn. L. Rev.* 341 (1966). The essential nexus is that the maker by his advertisements must have attempted to induce the injured person to purchase the product. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 *Minn. L. Rev.* 791 (1966). In support of this position, it has also been argued that the warranty of fitness does not extend to the public in general. *Hahn v. Ford Motor Co.*, 126 N.W.2d 350 (Ia. 1964). However, in *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965), the implied warranty was extended to cover a bystander who was hurt when the gun his brother was shooting blew up.[15] The court in *Piercefield* reasoned that foreseeability of harm was the test for the scope of liability. Moreover, since the warranty was implied by law, the doctrine of the best-risk-bearer also justified imposition of liability when

[15] The cases demonstrate that beyond the user or consumer the people allowed to recover have been narrowly confined. *Dagley v. Armstrong Rubber Co.*, 7th Cir. 1965, 344 F.2d 245 (employees); *Deveny v. Rheem Mfg. Co.*, 2d Cir. 1963, 319 F.2d 124 (guests); *Knab v. Alden's Irving Park, Inc.*, 49 Ill. App. 2d 42, 198 N.E.2d 681 (1964) (members of the family).

the injury was foreseeable. *Mitchell v. Miller*, 214 A.2d 694 (Conn. 1965). Apparently the rationale is that the maker can know that not all of his products are perfect and in light of this expectation can foresee that people within the vicinity of expected use will be hurt if the product is defective. *Ford Motor Co. v. Mathis*, 5th Cir. 1963, 322 F.2d 277, 274; *Cudmore v. Richardson-Merell, Inc.*, 398 S.W.2d 640 (Tex. Civ. App.—Dallas, 1966, writ ref'd n.r.e.); Comment, *Products Liability—Proceeding Apace*, 33 *Tenn. L. Rev.* 341, 355 (1966).

The intended marketing scheme is one basis for deciding which users can be foreseen. In the instant case the uncontradicted testimony shows that these products were not marketed for use by the ordinary consumer. The bleach was sold through the Beauty Division of Helene Curtis which sells directly or through distributors only to beauty shops. The Cosmair expert also stated that the cream peroxide was sold solely to beauty shops. Mr. Thompson, the manager of the beauty shop supply house for the Terrell area, confirmed the validity of these company policies. He is the sole Helene Curtis distributor in the Terrell area and has only one competitor for the Cosmair products. The professional beautician was also uncontradicted in her testimony that these products were not for public sale. It is this scheme which made the professional the foreseeable user and, as stated previously, it was only to this professional that directions about proper use had to be given. *Hubbard-Hall Chemical Co. v. Silverman*, 1st Cir. 1965, 340 F. 2d 402, 404.

Appellee has confused the doctrines of adequate directions and adequate warnings. Directions tell how to use the product efficiently while warnings tell the dangers involved. Dillard & Hart, *Products Liability: Directions for Use and the Duty to Warn,* 41 *Va. L. Rev.* 145, 147 (1955). Here, the directions on both products, including the technical terms referring to the peroxides, were adequate for the professional. It is only in relation to the professional that the adequacy of directions must be judged since a manufacturer does not have to give directions for use to a consumer when he has not employed his advertising to induce this consumer to make a purchase. *E. I. DuPont & Co. v. Baridon,* 8th Cir. 1934, 73 F.2d 26; Dillard & Hart, *supra,* at 161. Consequently, Appellants were not required to give directions which would allow Mrs. Pruitt to use the products safely. Indeed, they could confine their products to beauty shops, and incur liability only if a consumer were injured when the solutions were applied there. *Cf. Scottlemire v. Cawood,* D.C. 1963, 213 F. Supp. 897. Beyond that context they could not foresee any other use, unless it were determined that they could foresee the resale by the beauty shop. Even then the only additional duty would be to give adequate warnings that the product was not for use by a non-professional beautician.[16] The decisions dealing with the foreseeability of harm to allergic users are analogous. It is clear that the maker does not have to give directions which allow the allergic person to use the product.

[16] As stated previously, that issue is not before us on this appeal.

All that is required is a warning that the product is harmful to persons having a particular allergy. *Wright v. Carter Products*, 2d Cir. 1957, 244 F.2d 53, 57; *Crotty v. Shastenburg's New Haven, Inc.*, 147 Conn. 460, 162 A.2d 513 (1960); *Casagrande v. F. W. Woolworth, Inc.*, 340 Mass. 552, 165 N.E.2d 109 (1960); *Esborg v. Bailey Drug Co.*, 378 P. 2d 298 (Wash. 1963).

Two decisions provide further support for holding that Appellee was not a foreseeable user. In *Harper v. Remington Arms Co.*, 156 Misc. 53, 280 N.Y. Supp. 862 (Sup. Ct. 1935) the manufacturer sold shells which were made solely for testing guns. The shells were sold to the plaintiff, who did not realize that the words "Proof Load" meant that the shells had an abnormal explosive force. The Court found no liability, reasoning that the manufacturer was required to foresee only that class of persons who in the usual course of business would come within the orbit of danger. It could not foresee resale of the shells by the dealers to anyone except an arms manufacturer. In *Kaspirowitz v. Schering Corp.*, 70 N.J. Super. 397, 175 A.2d 658 (1961), the plaintiff purchased from a druggist a dandruff control product which was intended to be sold only by prescription. Although the druggist assured the plaintiff that there was no danger, harm still occurred. The plaintiff contended that it was reasonably foreseeable that the product would be used on the consumer market despite the warning to the druggist. The court disagreed, holding that the warning did not run to the plaintiff since the manufacturer had not promoted his product through ad-

vertising to the public. *See Scottlemire v. Cawood*, D.C. 1963, 213 F. Supp. 897.

Harper and *Kaspirowitz* suggest that a warning to the beauty shop terminated the makers' responsibility for the future sale of the product. While it is certain that appropriate words of caution are a part of the obligations incurred in producing and selling commodities, *Wright v. Carter Products*, 2d Cir. 1957, 244 F.2d 53, the warning need only be reasonably calculated to reach and be understood by the person likely to use the product. James, *Products Liability*, 34 Texas L. Rev. 45 (1955). These words of caution have to be placed so as to catch the attention of the user and give a fair indication of the danger. *Spruill v. Boyle-Midway, Inc.*, 4th Cir. 1962, 308 F.2d 79. The only beautician who testified knew that the products were not for public sale. The double warning on both sides of the Helene Curtis container imports this fact beyond any dispute: "FOR PROFESSIONAL USE ONLY—NOT FOR PUBLIC SALE." This was the only warning read by the parties before use. Both Mrs. Hendren and Dr. Majors testified that they understood the labels meant that the products were not for one unskilled in beauty applications. The Cosmair label contained the warning on the front: "FOR PROFESSIONAL USE." These words were sufficient, in light of the beautician's training and status as an expert, to apprise any beautician that the products were not for amateurs and thus not for resale.[17] Therefore, the resale by the beauty shop amounted

[17] Although not necessary to our decision, it should be noted that the training received by beauticians might well make this prohibition against resale a generally known

to an intervening cause which severed the causal chain and insulated Appellants from liability for any subsequent harm. Mrs. Hendren's failure to take the safety precautions an expert would have taken constitutes another intervening cause. *The Restatement of Torts* § 402A, which confines liability to products that have not been substantially altered after leaving the maker's control, supports this holding. *Cf. Grey v. Hayes-Semmons Chemical Co.*, 5th Cir. 1962, 310 F.2d 291; *Mazzi v. Greenlee Tool Co.*, 2d Cir. 1963, 320 F.2d 821; Comment, *Products Liability—Proceeding Apace* 33 *Tenn. L. Rev.* 341, 355 (1966). Surely this doctrine applies both to the product's composition and to its method of distribution. The question of intervening cause has arisen often when the distribution chain is composed of the maker, several intermediate parties. and finally the consumer. These cases uniformly hold that when one of the intermediate parties is notified of the danger and proceeds to sell the product anyway, the manufacturer is insulated from liability.[18]

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danger for which there is no duty to warn. *Jamieson v. Woodward & Lothrop*, D.C. Cir. 1957, 247 F.2d 23; *Parker v. State*, 201 Misc. 416, 106 N.Y.S.2d 741 (1951). The status of the beautician as an expert enables Appellants to rely also on the doctrine that they cannot be liable for a failure to warn another of a danger that was either known or that they should have known through the exercise of reasonable care. *Thibodaux v. McWane Cast Iron Pipe Co.*, 5th Cir. No. 23777, July 10, 1967.

If the beauty operators had any doubt about the policy they could have simply asked Mr. Thompson, the distributor, who would have advised them the labels were meant to be heeded.

[18] *Beesley v. United States*, 10th Cir. 1966, 364 F.2d 194; *Mazzi v. Greenlee Tool Co.*, 2d Cir. 1963, 320 F.2d 821; *E.I. DuPont Nemours & Co. v. Ladner*, 73 So. 2d 249 (Miss. 1954); *Kaspirowitz v. Schering Corp.*, 70 N.J. Super. 397, 175 A.2d

Although the foregoing considerations are sufficient to deny Appellee recovery, there are even more compelling reasons for our holding. These additional considerations grow out of the doctrine of foreseeability of harm. That doctrine is a judicial explanation of the social policies which limit liability. *Pease v. Sinclair Refining Co.*, 2d Cir. 1939, 104 F.2d 183. Once fault is removed as a limitation on liability, these policy considerations should be candidly explained. Until Americans have a comprehensive scheme of social insurance, courts must resolve by a balancing process the head-on collision between the need for adequate recovery and viable enterprises. Wilson, *Products Liability*, 43 *Calif. L. Rev.* 809 (1955). This balancing task should be approached with a realization that the basic consideration involves a determination of the most just allocation of the risk of loss between the members of the marketing chain.

It has been argued that the manufacturer should absorb the "typical risks" of marketing his product. Wilson, *Products Liability*, 43 *Calif. L. Rev.* 809 (1955). Is the chance that a non-professional would use the product a typical risk? Several factors are pertinent: The nature of the ultimate transaction; the methods employed in distributing the product; and the type of activity in which the user was engaged when harm occurred. *Seely v. White Motor Co.*, 45 Cal. Rptr. 17, 403 P.2d 145 (1965). In the instant case the products

658 (1961); *Ford Motor Co. v. Wagnor*, 183 Tenn. 392, 192 S.W.2d 840 (1946); *McLaughlin v. Mine Safety Appliances Co.*, 11 N.Y.2d 62, 181 N.E.2d 43 (1962); *Stultz v. Benson Lumber Co.*, 59 P.2d 100 (Calif. 1936).

were marketed through distributors to innumerable beauty shops all over the country. The distributor in the Terrell area was clear that the products were to be sold only to beauty shops. The warnings on the packages supported this testimony. Indeed, the advertisements used by Helene to induce the purchase by the beauty shops stated: "YOU'LL SEE THE DIFFERENCE . . . YOUR PATRONS WILL FEEL THE DIFFERENCE WITH HELENE CURTIS NEW BLUE BLEACH." In this type of market, it would be impossible to police the prohibited reselling by trade agreements. Nor can the single sale by a beauty shop in Terrell, Oklahoma be indicative of such a widespread practice in the industry that we can hold that the makers knew or should have known of the practice and should have taken additional precautionary steps. Noel, *Manufacturers Negligence of Design or Directions for Use of a Product,* 71 *Yale L.J.* 816 (1962). With only one injury since 1960, it would appear that reliance on the distributor to sell exclusively to beauty shops, the training of the beauticians, and the warnings on the package is adequate to prevent the mishandling of the products. James, *Products Liability,* 34 *Texas L. Rev.* 45, 48 (1955).

The type of activity in which the user was engaged when harm occurred also cuts against the makers' responsibility. There is no doubt that the primary "assault on the citadel of privity" has been led by consumer pressure. The decisions have suggested that the maker should be responsible for harm only when a consumer who has been induced through advertis-

ing to purchase the commodity is injured. *See Henningsen* and *Decker, supra*. That factor is not present here. Indeed, it is clear that these products were not household goods and not intended for public sale. Furthermore, if the judicial opinions are in conflict on whether the public will be willing to absorb the cost of injuries to innocent bystanders, there can be no doubt that the public will be unwilling to pay higher prices for products when the injured plaintiff is an unforeseen and unauthorized user. *Mitchell v. Miller*, 214 A.2d 694 (Conn. 1965). This consumer's expectations would never have been frustrated if she had exercised any precaution in seeing whether this product was meant for her. *Cf. Marathon, supra* at 915. It is not unreasonable to demand that the user exercise minimum precaution. *Betehia v. Cape Cod Corp.*, 10 Wis. 2d 323, 103 N.W. 64.[19] All prior cases have assumed that the consumer is incapable of finding out about the dangers. That rationale does not hold true here. *See Sawyer v. Pine Oil Sales Co.*, 5th Cir., 1946, 155 F.2d 855. In fact, Appellee simply took a cursory glance at the directions on the Helene product and did not even read the Cosmair label. When the product is a bleaching solution specifically designed for burning all the hair pigment, surely the manufacturer can expect more self-protection than that. If Appellee chose to entrust herself to the care of a friend, she cannot hold the maker liable for the friend's inadequacies. Therefore, although consumers' expecta-

[19] This factor is not meant to imply that the doctrine of contributory negligence has relevance to the denial of recovery in this case. Mrs. Pruitt's conduct is simply used as one factor in allocating the risk of loss. *See* Note, 45 *Texas L. Rev.* 790, 796 (1967).

tions are relevant, the expectations frustrated in this case are not the ones which have been the impetus behind the imposition of strict liability. Alternative ways existed for Mrs. Pruitt to satisfy her desire to be a blonde. *Cf.* Comment, *Strict Products Liability and The Bystander,* 64 *Colum. L. Rev.* 916 (1964). She could have simply gone to a qualified beautician.

The paramount reasons for denial of recovery in this case are the principles which have been traditionally employed to invoke the doctrine of strict liability. These policies compel our holding that the imposition of strict liability on these Appellants simply because they are the best-risk-bearers would be an undue impediment to business and an intolerable injustice. The policy that the maker has the greatest capacity to distribute the risks of loss is not such a blanket rule that it applies even though justice demands that another member of the marketing chain take the risk of loss for the injury. Confining the makers' responsibility to harm incurred by use of the products in a beauty shop is not a revival of the doctrine of privity of contract. It is simply an attempt to confine the scope of liability to the zone of danger which could reasonably have been foreseen before these products were sold. Even the decisions which give the broadest definitions of the intended-use doctrine do not go as far as Appellee urges. The decisions have expanded the doctrine of intended use to include the environment in which the product is used and the incidental and attendant consequences

that accompany normal use. *Spruille v. Boyle-Midway, Inc.*, 4th Cir. 1962, 308 F.2d 79; *Boyl v. California Chemical Co.*, D. Ore. 1963, 221 F. Supp. 669; *Hardman v. Helene Curtis Industries, Inc.*, 48 Ill. App. 2d 42, 198 N.E. 2d 681 (1964); *Haberley v. Reardon Co.*, 319 S.W.2d 859 (Mo. 1958). The environment of the products in this case is a beauty shop. Their attendant use and incidental consequences do not include resale by the beauty shop, a mixture contrary to directions, and application by a novice. The risk created by this resale was neither the kind which the product was likely to create, nor inherent in proper use. Any other holding would twist the doctrine of foreseeability of harm into that degree of clairvoyance which hindsight alone can give. *Butler v. L. Sonneborn Sons, Inc.*, 2d Cir. 1961, 296 F.2d 623; James, *Products Liability*, 34 Texas L. Rev. 45 (1955). Moreover, were we to bridge the gap between the present decisions and the instant situation, we could no longer say that manufacturers are not absolute insurers for all physical harm which occurs during use of the product. *See Goldberg v. Killsman Instrument Corp.*, 12 N.Y.2d 442, 191 N.E. 2d 81, 86-87 (1963); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *Yale L.J.* 499 (1961). The judicial doctrine of strict liability was not created to sanction such results. We therefore REVERSE the judgment of the district court and RENDER judgment in favor of the Appellants.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

D. C. Docket No. 7-66 Civil Action

HELENE CURTIS INDUSTRIES, INC.
and COSMAIR, INC.,
Appellants,

versus

EDD PRUITT and MARJORIE
ANN PRUITT,
Appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before RIVES, THORNBERRY and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and judgment is here rendered in favor of appellants, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, Edd Pruitt and Marjorie Ann Pruitt, be condemned, in solido,

to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

October 20, 1967

Issued as Mandate:
JAN 15 1968

Court Costs:

Docketing cause, etc . .	$25.00
Cost of Printing Record	$1662.50
Total	$1687.50

SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1278

EDD PRUITT AND MARJORIE ANN PRUITT,

Petitioners,

v.

HELENE CURTIS INDUSTRIES, INC.
AND COSMAIR, INC.,

Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NOW COMES Cosmair, Inc., one of the Respondents in the above styled cause and files this its reply to Petitioner's Application for Writ of Certiorari.

Statement of the Case

Respondent desires to make some minor corrections to the Statement of the Case as related by the Petitioner. On page 5 of the petition the Petitioner states that both Mrs. Hendren and the wife noted the warning on the product "For Professional Use Only". The wife testified that she did not see such warning on either product. Record, pages 60, 72 and 74. Mrs. Hendren did see the warning and when asked what it meant to her, she answered "Well, that if you didn't know how to use it—if you didn't know what you were doing, you'd best better leave it alone". Record, page 184.

On page 6 of their application the Petitioners state "It being the belief of both the wife and Mrs. Hendren that the L'Oreal Creme Developer fitted the Helene Curtis description of a good grade of fresh twenty-volume hydrogen peroxide that could be mixed with Helene Curtis Blue Bleach". This statement is in direct conflict to the uncontradicted evidence. The wife testified that she did not know whether the twenty-volume creme peroxide was the same as a fresh twenty-volume hydrogen peroxide. On page 221, Mrs. Hendren testified that they were not the same. These statements are made in the petition in an attempt to excuse Petitioners' ignoring the Helene Curtis instruction: "Do Not Mix Helene Curtis New Blue Bleach With Anything Except Helene Curtis Creme Developer (Or A Good Grade of Fresh Twenty-Volume Hydrogen Peroxide)".

Again on page 6 of the application the Petitioner makes the statement that after making the strand test, Mrs. Hendren rinsed off the hair used in the test before mixing the remainder of the batch and applying the mixture to all the hair. There is no testimony in the record that the strand of hair used in the test was ever rinsed off until the entire mixture was washed out of the wife's head.

Petitioners did not request any issues of the trial court under the Federal Food, Drug & Cosmetic Act, 21 U.S.C.A., paragraph 361, or make a motion for an instructed verdict

under such act. Instead they sought to place their recovery under the Federal Hazardous Substance Labeling Act, 15 U.S.C.A., paragraph 1261.

Reasons for Denying the Writ

Sub-section 5 of Rule 38 of the Supreme Court Rules provide, "A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor". The decision in the present case at bar is not in conflict with the decisions of another Circuit Court of Appeals on the same matter; does not decide an important question of local law in a way probably in conflict with applicable local decisions; does not decide an important question of Federal law which has not been, but should be, settled by this Honorable Court; does not decide a Federal question in a way probably in conflict with applicable decisions of this Honorable Court and has not, so far, departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

On page 19 of their application the Petitioners make the statement, "Thus, having found no error in the instructions, the Fifth Circuit should have affirmed the jury verdict". A casual reading of the opinion refutes this statement. On page 7 of the opinion the Court states, "The mere imposition of strict liability on cosmetic makers does not, however, as the trial court's charge assumed, mean that the maker is liable for any harm to anybody under any circumstances". Again on page 8 of the opinion the Court stated, "The trial court's submission of strict liability ignores these principles". After making these general statements condemning the charges and the instruction, the Fifth Circuit then proceeded to base its opinion on the fact that the Respondents were entitled to an instructed verdict. Since Petitioner's evidence was insufficient to warrant liability under strict liability the Fifth

Circuit never reached or discussed the Respondent's complaints with reference to the Court's instructions and charges.

Petitioners do not point out any local decision or decisions of any Circuit Court that are in conflict with the present opinion. They merely complain because the Fifth Circuit exercised its right to hold that the evidence was insufficient to support a cause of action against Respondents. In *Shirey v. Louisville & Nashville Railroad Company*, 327 F.2d 549, the Fifth Circuit quotes from *Reuter v. Eastern Air Lines*, 226 F.2d 443, the following:

> "In determining whether there is sufficient evidence to take the case to the jury, a federal judge performs a judicial function and is not a mere automaton. Gunning v. Cooley, 281 U.S. 90, 93, 50 S. Ct. 231, 74 L. Ed. 720. He must determine, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it. Improvement Co. v. Munson, 14 Wall. 442, 448; see Railway Express Agency v. Mallory, 5 Cir., 168 F.2d 426, 427. The requirement is for probative facts capable of supporting, with reason, the conclusion expressed in the verdict. Myers v. Reading Co., 331 U.S. 477, 485, 67 S. Ct. 1334, 1339, 91 L. Ed. 1615; see Thomas v. Atlantic Coast Line R. Co., 5 Cir., 223 F.2d 1, 4".

Petitioners' cause of action was based on a defect in the product. The Fifth Circuit, on pages 16 and 17 of its opinion, states: "All that is in issue is the sufficiency of the evidence to infer a defect in a product." In next to the last paragraph of the conclusion of their Motion for Rehearing in the Fifth Circuit, the Petitioners admit the correctness of the Court's ruling when they state, "Under the record and evidence herein Appellee will candidly admit no defect was proven in the Helene Curtis New Blue Bleach. Under the record the Appellant, Helene Curtis, is entitled to a reversal of the judgment against it." Now they seek to come before this Honorable Court and say that the Fifth Circuit denied

them their right to the benefit of a jury trial under the Seventh Amendment which is in direct opposition to their statement in their Motion for Rehearing in the Fifth Circuit.

The writer has not been able to find a single case from any jurisdiction that holds the manufacturer of a product liable under strict liability if the ingredients in his product were not suitable and reasonably fit to be used for the purpose for which it was used when used in combination with another product. All cases on strict liability impose the test whether the product was reasonably suitable for the purpose for which it was intended at the time it left the factory.

As the Fifth Circuit said on page 14 of its opinion, "The cornerstone rule in products liability is that proof of mere injury furnishes no basis for inferring that the product was defective for its intended use". In addition to the cases cited by the Fifth Circuit, the recent Texas case of *Proctor & Gamble Manufacturing Company v. Langley*, 422 S.W.2d 773, is almost directly in point; this case held that damage following use of a permanent hair waving preparation was not sufficient to sustain a finding that the product was in a defective condition at the time it left the hands of the seller. The Texas case involved the product of but one manufacturer. The present case at bar involves the product of two separate and distinct companies. When the products were mixed together and used, injury following use can be no evidence of defect in either product at the time it left the factory.

The evidence in the present case shows that a strand test was first made on the wife. There is no evidence that the solution used for the strand test was ever removed from the strand of hair. The mixture was then applied to the rest of the hair. If the mixture had been defective, the entire head should have been damaged. As it was, the damage was confined to the vicinity of where the strand test was made.

Petitioners repeat several times in their application that the instructions were followed. However, their own uncontradicted testimony shows beyond dispute that they failed to follow the instructions in the following particulars:

1. Use by novices when the instructions on both products provided that it was to be used by professionals only.

Mrs. Hendren understood this to mean that you had better let it alone, if you did not know what you were doing. the wife never saw this instruction on either product.

2. Mixture of the Helene Curtis New Blue Bleach with the L'Oreal Creme Developer. The third direction found on Plaintiff's exhibit No. 2, page 13 of the Fifth Circuit's opinion, prohibit this in the following words, "Do Not Mix Helene Curtis New Blue Bleach With Anything Except Helene Curtis Creme Developer or a Good Grade of Fresh Twenty-Volume Hydrogen Peroxide".

3. In permitting the mixture to touch the ear and scalp.

The instructions provided "Do confine the mixture to the hair only".

In *Proctor & Gamble Manufacturing Company v. Langley*, *supra*, the Texas courts state, "We are of the opinion that Mrs. Langley's violation of the plain instruction and warning was a misuse of "Milk Wave Lilt" and constituted a defense to her cause of action". See also Restatement of the Law of Tort, Second Edition, Sec. 402(a), Comment J; *Matthias v. Lehn & Fink Products Corporation*, 424 P.2d 284; *Pinto v. Clairol, Inc.*, 324 F.2d 608; *Arata v. Tonegato*, 314 P.2d 130; *Taylor v. Jacobson*, 147 N.E.2d 770; Prosser, *"The Fall of the Citadel"*, 50 Minn. Law Rev. 591; Hursh, *"Products Liability Supplement"*, Sec. 5A:12.

By their fourth paragraph under "Questions Presented" and by their third paragraph under "Constitutional and Statutory Provisions Involved," Petitioners seek at this time to have this Honorable Court grant a Writ of Certiorari under some theory under the Federal Food, Drug & Cosmetic Act.

Although Petitioners did plead a violation of the act in broad terms under their pleadings, they requested no instructed verdict under any theory of the act, submitted no issues under any theory of the act and cannot now complain of a matter they did not properly raise in the trial court or in the Fifth Circuit Court.

CONCLUSION

Neither the Fifth Circuit's holding of insufficiency of the evidence to establish a defect, or its holding of misuse of the products conflicts with any decision by any Circuit Court, or with any local decisions. They do not raise an important question of Federal Law which has not been, but should be settled, by this Honorable Court; they do not decide a federal question in a way probably in conflict with applicable decisions of this Honorable Court and they do not depart from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Honorable Court's power of supervision. A close reading of the opinion of the Fifth Circuit Court in this case reveals that it has followed the established law. It has not pioneered by holding cosmetic makers liable for any harm to anybody under any circumstances.

This Respondent respectfully submits that the petition for Writ of Certiorari should be in all things denied.

Respectfully submitted,

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